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No. _____

In The

Supreme Court of the United States

October Term, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the "taking without just compensation" guarantee of the Fifth Amendment to the United States Constitution?

2. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

3. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the substantive and procedural due process guarantees of the Fourteenth Amendment to the United States Constitution?

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The petitioners, Patricia Echarte, a minor, by and through her parents and natural guardians, Norma Echarte and Pedro Echarte, and Norma Echarte and Pedro Echarte, individually, respectfully pray that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Florida entered in this proceeding on May 13, 1993.

OPINIONS BELOW

The decision of the Supreme Court of Florida, which consists of a majority opinion and two dissenting opinions, is reported at 618 So.2d 189, and appears in the separate appendix at pages 1-32. The decision of the District Court of Appeal of Florida, Third District, is reported at 585 So.2d 293, and appears in the appendix at pages 33-54. The trial court's "Summary Final Judgment Declaring §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.), Unconstitutional" is reported at 40 Fla. Supp.2d 193, 15 Fla. Law Weekly C15, and appears in the appendix at pages 55-61.

JURISDICTION

The decision and judgment of the Supreme Court of Florida was entered on May 13, 1993. No motion for rehearing was filed. This petition for writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution (emphasis supplied):

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put ~~in~~ jeopardy of life or limb; nor shall ~~be~~ compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

Fourteenth Amendment, Section 1, U ted States Constitution (emphasis supplied):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Florida Statutes whose constitutionality is in issue here are §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.). Because they are fairly lengthy, we will not set them out here. They are quoted in full in the appendix, in

the decision of the District Court of Appeal, at pages 34-39.

STATEMENT OF THE CASE

In 1986, at the vocal insistence of powerful medical and insurance industry lobbies, the Florida legislature imposed an absolute $450,000.00 "cap" on the recovery of intangible damages by all Florida tort victims. Ch. 86-160, § 59, Laws of Florida. Within a year, by a vote of 5 to 2, the Florida Supreme Court declared this "cap" to be wholly arbitrary, and in violation of Florida's constitutional right of access to the courts and right to trial by jury. *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). The lobbies responded with a well-funded petition drive to place a constitutional amendment on the ballot which, had it passed, would have imposed a $100,000.00 "cap" on the recovery of intangible damages by all tort victims. The proposed amendment was roundly and soundly defeated by Florida's voters.

The lobbies had more success with the Florida legislature, which responded to the *Smith* decision with more selective, but no less draconian damage "caps," directing them at medical malpractice victims alone. Sections 766.207 and 766.209, Fla. Stat. (1988 Supp.). When the constitutionality of those statutes ultimately reached the Florida Supreme Court, the composition of the Court had changed. Two justices who had not participated in the earlier decision in *Smith* joined the two justices who had dissented there, to produce a 4 to 2 majority (one justice

recused) upholding the statutes against numerous constitutional challenges (App. pp. 1-32).[1] It is that decision which we ask this Court to review. Its factual and procedural background follows.

The "Findings of Fact" which the trial court made below adequately sketch both the facts and the problem:

> The plaintiff, Patricia Echarte, is a minor, and is represented here by her parents and natural guardians, Norma Echarte and Pedro Echarte. Mr. and Mrs. Echarte are also plaintiffs, in their individual capacities. On January 10, 1989, Patricia Echarte [who was then less than a year old] was admitted to Jackson Memorial Hospital as a patient of agents of the defendant, for surgery unrelated to the incident in suit. The surgery was performed by agents of the defendant on January 11, 1989. As a result of various negligent acts and omissions committed by agents of the defendant during the surgery and the hospitalization which followed, Patricia Echarte's right arm was injured, and it had to be amputated below the elbow on February 8, 1989, to save her life.
>
> On June 22, 1989, the plaintiffs delivered a Notice of Intent to Initiate Litigation letter upon the defendant, as required by § 766.106, Fla. Stat. (1988 Supp.). All other conditions precedent to perfecting the plaintiffs' potential claims for medical malpractice against the defendant were also performed. On July 12, 1989, the

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[1] The justice who was recused had joined the earlier majority in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987), so, but for the recusal, the vote would most likely have been 4 to 3.

> defendant responded in writing to the plaintiffs' notice of intent letter. The response requests that the plaintiffs accept voluntary arbitration of their claims, pursuant to § 766.207, Fla. Stat. (1988 Supp.). The defendant's response amounts to an admission of liability, coupled with a request that the plaintiffs' damages be determined by arbitration rather than jury trial, but subject to the various damage "caps" set forth in § 766.207.
>
> If the plaintiffs accept the defendant's request, liability will be deemed admitted, but the plaintiffs' damages will be limited to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; (3) a percentage of no more than $250,000.00, to be determined by the arbitrators based upon Patricia's percentage loss of the capacity to enjoy life, for the various items of the plaintiffs' non-economic damages otherwise recognized by law; and (4) various costs and limited attorney's fees. If the plaintiffs reject the defendant's request, they will be required to litigate the issue of the defendant's liability, and their damages will be limited by § 766.209, Fla. Stat. (1988 Supp.), to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; and (3) non-economic damages not to exceed $350,000.00. Given her tender age and the nature of her injury, Patricia Echarte's actual damages far exceed those limited amounts. The plaintiffs are legitimately in doubt as to their legal rights.

(App. pp. 56-57).[2]

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[2] The non-economic damages "capped" by the defendant's admission of liability are elsewhere defined in § 766.202(7), Fla. Stat. (1988 Supp.), as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action,

It was to resolve these doubts that the Echartes filed a Complaint for Declaratory Judgment against the respondent here, University of Miami, d/b/a the University of Miami School of Medicine (App. pp. 62-67). The complaint alleged that §§ 766.207 and 766.209 violated various provisions of the Florida Constitution and the United States Constitution, including the Fifth and Fourteenth Amendments to the latter constitution; it prayed for a judgment declaring the two statutes unconstitutional, and for a declaration that the plaintiffs were entitled to a jury trial of their claims against the defendant at which they could recover the total amount of their actual damages, as the statutes allowed other medical malpractice victims to do. The plaintiffs ultimately moved for a summary judgment in their favor; in the memorandum of law filed in support of their motion, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here.[3]

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including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses." We take it to be obvious that the loss of an arm before a first birthday causes damages of this kind well in excess of $350,000.00.

[3] Because the trial court's declaratory judgment expressly ruled in the plaintiffs' favor on the second and third questions presented for review here (App. pp. 59-60), and because the Florida Supreme Court's decision expressly rejects our position on those questions (App. pp. 2-3), there should be no need for us to be particularly specific about how those two questions were raised below in the lower courts. None of the lower courts expressly disposed of the first question presented for review here, however, so we have included in the appendix our arguments on that issue, which were consistently made at every stage of the proceedings. The argument was made to the trial

The trial court granted the plaintiffs' motion for summary judgment and entered a final judgment declaring that the statutes violated several provisions of the Florida Constitution and the Fourteenth Amendment to the United States Constitution:

> By "capping" the plaintiffs' damage recovery in specific amounts, the challenged statutes create two classifications of medical malpractice victims – those with insignificant injuries who are compensated in full, and those with serious injuries who are deprived of full compensation. This classification is entirely arbitrary and contrary to the fundamental notion of equal justice under the law. [Citation omitted]. It is also impossible that singling out the most seriously injured medical malpractice victims, rather than imposing the same burden equally upon all such victims, bears any *rational* relationship to the avowed purpose of the statutes. [Citation omitted]. The challenged statutes therefore violate the equal protection guarantees of both the Florida Constitution and the United States Constitution.
>
> To cap a plaintiff's damages at a specified numerically-defined amount without regard to the actual damages caused by a defendant's malpractice is, by definition, to draw an entirely

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court at pages 26-27 of the memorandum filed in support of our motion for summary judgment (App. pp. 68-69). The argument was made to the District Court of Appeal at p. 33 of our Brief of Appellees (App. p. 70). And the argument was made to the Supreme Court at page 37 of our Brief of Appellees (App. p. 70). These arguments were more than sufficient to preserve the question for review here. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980).

> arbitrary line between recovery and non-recovery. [Citation omitted]. In addition, a statutory scheme which allows insignificantly injured medical malpractice victims to recover the full amount of their damages, but which deprives seriously injured victims of a full recovery (with the extent of that deprivation *increasing* as the extent of injury increases) is both unreasonable and oppressive. [Citation omitted]. The challenged statutes therefore violate the procedural and substantive due process guarantees of both the Florida Constitution and the United States Constitution.

(App. pp. 59-60).

The trial court also declared the statutes violative of Florida's "takings" clause, which is indistinguishable from the "takings" clause in the Fifth Amendment to the United States Constitution, as follows:

> The challenged statutes recognize that the plaintiffs have a vested property right in a recovery of their actual damages, because they authorize recovery of the full measure of damages if the defendant had not elected to request arbitration. Yet the statutes delegate to the defendant the unilateral right to deprive the plaintiffs of a portion of that property and retain that portion for its own benefit, without providing any mechanism for compensating the plaintiffs for that "taking". Article X, § 6(a) of the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . " The challenged statutes clearly violate the plain language of this provision of the Florida Constitution. [Citation omitted].

(App. pp. 58-59). Unfortunately, the trial court did not expressly rule on our similar claim under the Fifth Amendment.

The University of Miami thereafter appealed the judgment to the District Court of Appeal of Florida, Third District. Once again, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here. Because the trial court had not expressly ruled on our federal "takings" clause argument, we raised the argument again, as we were entitled to do, under Florida's familiar "right for the wrong reason" rule (App. p. 70). *See Landis v. Allstate Insurance Co.*, 546 So.2d 1051 (Fla. 1989). A three-judge panel of the District Court of Appeal unanimously affirmed the trial court's declaratory judgment (App. pp. 33-54). It rested its determination of the unconstitutionality of the two statutes on a single ground – their violation of Florida's "access to courts" guarantee – and expressly declined to review the remaining grounds in the trial court's judgment as unnecessary to its affirmance (App. p. 40).

The University of Miami thereafter appealed this decision to the Florida Supreme Court. Once again, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here. Because the District Court of Appeal had not expressly ruled on any of our federal constitutional arguments, we raised the arguments again under the "right for the wrong reason" rule (App. p. 70). By a vote of 4 to 2 (one justice recused), the Supreme Court of Florida reversed the District Court's determination that the statutes violated Florida's "access to courts" guarantee (App. pp. 1-33).

The majority also expressly rejected the remaining grounds upon which the trial court had declared the statutes unconstitutional, with a cursory shrug of its pen, as follows:

> . . . [W]e limit our discussion to the validity of the statutes under the right of access to the courts. However, we have also considered the other constitutional claims and hold that the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the non-delegation doctrine.

(App. p. 3).

Both of the dissenting justices disagreed vigorously with the majority's conclusion that the statutes passed muster under Florida's "access to courts" guarantee. Both dissenting justices also opined that the statutes violated the equal protection guarantee of the Fourteenth Amendment to the United States Constitution (App. pp. 21-23, 31). Both dissenting justices also opined that the statutes violated the "taking" clause of the Fifth Amendment to the United States Constitution: "A benefit enjoyed by the general public at the expense of a particular claimant is a taking of the claimant's property without compensation, in violation of the state and federal constitutions" (App. p. 31). And both dissenting justices declared that our arguments bottomed upon the substantive and procedural due process guarantees of the Fourteenth Amendment were "persuasive" (App. pp. 30-31). This timely petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The statutory scheme in issue here plainly violates the "no taking without just compensation" guarantee of the Fifth Amendment, as interpreted and applied by decisions of this Court.

While our first contention is unconventional (because the statutes in issue here are unprecedented), the contention is perfectly straightforward. The Fifth Amendment's proscription against the taking of private property for public use without just compensation undeniably applies to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). It is also settled in this Court that a cause of action for damages, if recognized by state law, creates a "property right" in the injured person which is protected by the Fifth and Fourteenth Amendments. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See Tulsa Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) (" . . . a cause of action is a species of property protected by the Fourteenth Amendment. . . . "). This Court's constitutional jurisprudence also does not "distinguish among different kinds of property . . . ," and "[a]ny significant taking of property by the State is within the purview . . . " of constitutional protection. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 608 (1975).

The purpose of the Fifth Amendment's proscription is also settled: "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, supra* at 163, *quoting*

Armstrong v. United States, 364 U.S. 40, 49 (1960). *Accord First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987). Most respectfully, that is *precisely* what the statutory scheme in issue here does: it forces *only* the most seriously injured victims of medical malpractice to bear *all* of the burdens of the purported public benefit of reducing the cost of malpractice insurance.

The statutes were enacted for the express purpose of providing an incentive to medical malpractice defendants to admit liability, in order to reduce the costs of litigation and to shave a few percentage points (a hypothetically estimated 2.4% to 11%) off the cost of medical malpractice liability insurance – for the purported benefit of the public as a whole (App. pp. 4-6, 53). The Florida legislature did not simply abolish or limit medical malpractice victims' causes of action to that end, however, as this Court's Fifth Amendment jurisprudence might have allowed. *See Logan, supra* at 432 ("While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred. . . . "). Instead, the statutes in issue here explicitly recognize that medical malpractice victims do have property rights, both in their causes of action and in the *full* amount of their economic and intangible damages, because they initially authorize recovery of the full measure of a medical malpractice victim's damages in all cases, and then simply delegate to negligent defendants the right to avoid paying some of those damages in whatever cases they select by exercising

their unilateral option to admit rather than contest liability.[4]

To be more specific, a plaintiff who has suffered intangible damages in an amount less than the "caps" is entitled to recover 100% of those damages, whether the defendant chooses to admit liability or not. In addition, a plaintiff who has suffered intangible damages in an amount which exceeds the "caps" is also entitled to recover 100% of those damages if the defendant chooses to contest the issue of its liability before a jury. The *only* circumstance in which these pre-existing and statutorily-recognized property rights are curtailed is when a defendant takes advantage of the singular *option* granted him by the statutes to admit liability and demand arbitration when the plaintiffs' property rights exceed the "caps." That statutory option is neither an abolition of a cause of action nor a declaration that the plaintiff has no property rights in the full measure of his damages; it is simply a grant of unilateral authority to medical malpractice defendants to pay less than full compensation to their

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[4] In the argument which follows, we will focus upon the optional "caps" imposed upon intangible damages. We remind the Court here, however, that the statutes contain an additional wrinkle concerning damages for past lost income and future loss of earning capacity. The statutes recognize an initial property interest in the recovery of 100% of those damages, until the point at which the defendant exercises its option. If the defendant chooses to contest liability, the plaintiff may recover the full 100% of each of those items of damage. If the defendant chooses to admit liability by demanding arbitration, 20% of those damages are automatically lopped off. The analysis in the text applies to the uncompensated "taking" represented by this aspect of the statutory scheme as well.

victims if they choose to admit, rather than to contest, liability. And that, we believe, amounts to precisely the type of "taking" prohibited by the Fifth Amendment. *See Logan, supra* at 432 ("While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred. . . . ").

The point can best be made with a simple, parallel hypothetical. Assume that, instead of imposing "caps" on the amounts which a negligent defendant had to *pay* its victim, the statutes required the defendant to pay the victim the full measure of compensation needed to redress the victim's intangible damages, and then required the plaintiff to pay over to the state all sums recovered above $250,000.00 or $350,000.00 (depending upon whether the plaintiff had accepted or rejected a defendant's demand to arbitrate). The statutes might then require the state to place these monies into the general revenue fund for the public benefit, or even to return the monies collected to the defendant (or its insurer) for the putative public benefit of reducing liability insurance rates and increasing the availability of medical care. If that is what the statutes had required, we believe this Court would not have hesitated for an instant to declare such a scheme violative of the Fifth Amendment – because it is *precisely* that type of uncompensated appropriation of private property interests which the Fifth Amendment is designed to prevent.

The statutes presently before the Court are different in form from our hypothetical, of course. In substance, however, they do exactly the same thing – and the difference amounts to little more than a bookkeeping entry.

Instead of the state taking the plaintiff's property and placing it in the general revenue fund or returning it to the defendant (or its insurer) for the public benefit, the statutes in issue simply delegate authority to the defendant to keep the money in the first instance, eliminating the transactions in between. And if our hypothetical statutes would violate the Fifth Amendment, then the statutes in issue here – which amount to little more than a shell game in which exactly the same thing is accomplished, by delegating to the defendant the option to appropriate the plaintiff's property rights without compensation simply by admitting liability – must be held violative of the Fifth Amendment as well. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (where a state is prohibited by the Constitution from doing a particular act, the state may not statutorily delegate authority to a citizen to do that particular act); *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla.) (same), *aff'd sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976).

Most respectfully, the statutes in issue here plainly confer property rights upon the innocent child who was the victim of the defendant's malpractice in this case – for *all* of her damages, both economic and intangible. They then confer upon the defendant the unilateral option to contest liability and pay *all* of those damages if found negligent by a jury, or to deprive the innocent plaintiff of 20% of her economic loss of earning capacity and all of her intangible damages above $250,000.00 or $350,000.00, simply by admitting liability before suit is filed – all for the putative benefit of the public as a whole. We repeat: "[t]he Fifth Amendment's guarantee . . . was designed to

bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, supra* at 163. The statutes in issue here place all the public burden of reducing the cost of liability insurance solely upon the most seriously injured victims of medical malpractice, at the sole election of their victimizers – and if the Fifth Amendment's proscription against the taking of private property for public use without just compensation does not prohibit such a taking, then we respectfully submit that this constitutional guarantee has been reduced to an empty shell.

2. The statutory scheme in issue here plainly violates the equal protection guarantee of the Fourteenth Amendment, and the Florida Supreme Court's determination of this federal question conflicts with the decisions of several other state courts of last resort.

Quite apart from the uncompensated "taking" of private property interests which the statutes effectively permit, the statutes in issue here also violate the equal protection guarantee of the Fourteenth Amendment – because they are totally arbitrary in the monetary lines they draw between recovery and non-recovery, and wholly irrational in their classifications, as several state courts of last resort have held in ruling on the constitutionality of similar statutes imposing damage "caps." This is not a case like *Martinez v. California*, 444 U.S. 277 (1980), in which a legislature has simply abolished a cause of action or immunized a particular class of defendants. The statutes in issue here explicitly confer a cause

of action upon victims of medical malpractice, and open the courts to them for recovery of their damages. This Court's decisions therefore require that the innocent child in this case be treated evenhandedly with all other medical malpractice victims in Florida. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bounds v. Smith*, 430 U.S. 817 (1977).

Neither is this a case like the ones on which the defendant will no doubt rely in response, in which a legislature has singled out medical malpractice victims for disparate treatment from victims of various other types of tortious conduct. The statutes in issue here are quite different. They discriminate *between* medical malpractice victims, and against a very small number of them. They create a class which is narrowed in two successive steps – the first by the legislature, the second by admittedly negligent defendants – to a very small class, in which only the most deserving plaintiffs are deprived for the benefit of the least deserving defendants.

First, the statutes themselves discriminate solely against those victims of medical malpractice who suffer the most severe injuries, and who therefore suffer the greatest intangible damages. It might have been another matter if the legislature had asked *all* medical malpractice victims to contribute to a supposed greater good. But these statutes ask no sacrifice of those victims whose victimizers opt for their day in court. And these statutes ask no sacrifice of those victims who suffer intangible damages in the arbitrary amount of $350,000.00 or less, even where their victimizers choose to admit liability. Such plaintiffs may reject the defendant's admission of

liability and demand for arbitration, and proceed to trial for the full amount of their intangible damages. Only those who have suffered greater losses are subject to the statutory "caps." Worse still, because the extent of the deprivation increases as the losses increase, the *most* seriously injured victims are the most seriously deprived by the statutory "caps" – and the greater the damages, the larger the deprivation.

Second, the class defined by the statutes themselves is only a potential class, subject to further definition – not by the legislature, but by a delegation of the legislature's lawmaking authority to medical defendants. The delegation occurs in the statutory option granted to medical defendants charged with negligence to select from their victims those who will be included in the class and those who will be excluded from the class. When a defendant charged with negligence chooses to contest the charge in a court of law, the plaintiff is excluded from the class. When a defendant charged with negligence chooses to admit the charge rather than contest it, the plaintiff is then included in the class affected by the "caps."

And because an admission of liability will rarely occur unless the defendant's conduct was so obviously negligent that it would be difficult to defend in a court of law, the class which is ultimately created by this two-step process includes only the most deserving plaintiffs who have been victimized by the least deserving defendants. Worse still, the "caps" which are imposed when a victim demands his right to a jury trial after the admittedly negligent defendant has selected him for inclusion in the class is not imposed for any purpose actually related to the public good. According to the plain languge of

§ 766.209(4)(a), the "caps" are deemed "warranted by the claimant's refusal to accept arbitration . . . ," and they are therefore simply a punishment for the plaintiff's exercise of his constitutional right to a jury trial, which is also explicitly recognized by § 766.209(1).

In short, the classification created by the statutes in issue here applies only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the delegated election of the admittedly negligent defendant and as a punishment for exercising a constitutional right. The statutes affect *only* those persons – and no one else. It is almost as if, to shave a few percentage points off liability insurance premiums, the legislature had imposed damage "caps" on all illegitimate children, or on all blonde women, or on all left-handed or red-haired malpractice victims – but not quite. The statutes in issue here are worse; they allow the most obviously negligent defendants to single out the most seriously injured victims of their malpractice for special deprivation – and the greater the losses, the harsher the punishment.

In our judgment, this classification is so obviously and invidiously upside-down as to be arbitrary and irrational in the extreme – and unless the equal protection guarantee of the Fourteenth Amendment is to be declared essentially meaningless, the statutes in issue here simply must be declared constitutionally impermissible. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (state violates equal protection clause by denying to illegitimate children wrongful death recovery available to legitimate children); *Levy v. Louisiana*, 391 U.S. 68 (1968)

(state violates equal protection clause by denying to illegitimate children workers' compensation benefits available to legitimate children); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) (state violates equal protection clause by denying to mother of illegitimate child wrongful death recovery available to parent of legitimate child); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (state violates equal protection clause by discriminating against illegitimate children in actions to obtain paternal support with considerably shorter statute of limitations than period imposed on legitimate children).

Most respectfully, if a state cannot withhold damage recoveries available to others simply because a child is illegitimate, we fail to see how Florida can permissibly withhold a full damage recovery available to others simply because a child is more seriously injured than most, and because her victimizer was so obviously negligent that it finds it prudent to concede its liability rather than face a jury of its peers. A statutory classification which rewards an admitted wrongdoer at the expense of its innocent, seriously maimed victim in this fashion simply cannot qualify as rational or reasonably based – and it remains for this Court to say so, else the Fourteenth Amendment remain essentially meaningless in Florida.

It is also noteworthy that several state courts of last resort have declared similar "caps" upon medical malpractice (and other tort) victims' recoveries to be both arbitrary and irrational, because they single out only the most seriously injured victims for deprivation, and have held such statutes violative of the constitutional guarantee of equal protection under the Fourteenth Amendment and parallel state equal protection guarantees. *See, e.g.*,

Arneson v. Olsen, 270 N.W.2d 125 (N. Dak. 1978); *Carson v. Mauer*, 120 N.H. 925, 424 A.2d 825 (1980); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 68, 763 P.2d 1153 (1988).

Other courts, as the defendant will point out in response, have disagreed – at least in cases involving straight damage "caps," without the further discrimination presented by the statutes in issue here, which grant negligent defendants the unilateral right to select from their more seriously injured victims those who will be victims of the "caps." All that such a response will demonstrate, however, is that the lower courts are badly divided on the reach of the equal protection guarantee in the context presented here – which should be reason enough for this Court to settle the existing controversy by granting certiorari in the instant case. We respectfully urge the Court to do so.

3. The statutory scheme in issue here plainly violates the substantive and procedural due process guarantees of the Fourteenth Amendment, and the Florida Supreme Court's determination of this federal question conflicts with the decisions of other state courts of last resort.

In the context presented here, the test for determining a substantive due process challenge is essentially the same as the test governing an equal protection challenge. *See United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973). And because we have already demonstrated the

arbitrariness and irrationality of the statutes in issue here, we will not parse the statutes again. We point out simply that damage "caps," because they are simply fixed numbers imposed as a ceiling without regard to the actual damages involved, are wholly "arbitrary" lines drawn between recovery and non-recovery – lines which are no lines at all where minor injuries are concerned, but which become harsher and harsher as the severity of the injuries increases.

And the statutes in issue here are, of course, not merely "caps." Instead, the "caps" which they impose apply only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the sole election of the wrongdoer, and the "caps" which apply in the instant case are explicitly defined as a punishment for exercising a constitutional right to trial by jury. Most respectfully, if simple "caps" are by their nature wholly "arbitrary," then the Rube Goldberg mechanism by which "caps" are imposed by the statutes in issue here, at the unilateral option of negligent defendants, are much worse than merely "arbitrary."

In any event, even if some wholly arbitrary line-drawing were permissible in an effort to meet legitimate governmental objectives, we do not believe that the arbitrary lines drawn by the statutes in issue here bear any reasonable relationship to the stated objectives of the legislation. Our point has been nicely made by the Texas Supreme Court as follows:

> In the context of persons catastrophically injured by medical negligence, we believe it is

> unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease . . . . [W]e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.
>
> Even the Keeton Commission [Texas Medical Professional Liability Study Commission] could not conclude that there was any correlation between a damage cap and the stated legislative purpose of improved health care, stating that adequate data was lacking. . . . One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates [thereby reducing available health care], given that less than .6% of all claims brought are for over $100,000. Sumner, *The Dollars and Cents of Hospital Malpractice Insurance*, 9 (Aft Books 1979).

Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).[5]

It is for this reason that some state courts of last resort have held straight damage "caps" upon medical malpractice victims' recoveries to be violative of substantive due process guarantees as well. *See Morris v. Savoy*,

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[5] Similarly, the Academic Task Force which recommended the statutory scheme in issue here to the Florida legislature based its projection of a 2.4% to 11% reduction in loss payments on "hypothetical assumptions (rather than empirical data)," and expressly cautioned that its analysis "should not be misinterpreted as vouching for the amount of savings that might be realized from caps on non-economic damages" (App. p. 53).

61 Ohio St.3d 684, 576 N.E.2d 765, 771 (1991) ("[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice."); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (similar). *See also Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Wright v. Central DuPage Hospital*, 63 Ill.2d 313, 347 N.E.2d 736 (1976).[6] These conflicts also deserve this Court's attention.

Finally, in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), this Court held that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The statutes in issue here preserve a medical malpractice victim's claim of right and duty, but they clearly deny a meaningful opportunity to be heard within the judicial system to a very small set of the most deserving victims of the least deserving defendants. Moreover, the denial which occurs is not imposed by the law itself,

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[6] Other state courts of last resort have overturned various statutory "caps" on damages like those in issue here under constitutional provisions guaranteeing a right of access to the courts – a right which is inherent in the Fourteenth Amendment's due process guarantee. *See Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Boswell v. Phoenix Newspapers, Inc.*, 154 Ariz. 9, 730 P.2d 186 (1986), *cert. denied*, 481 U.S. 1029 (1987). Other state courts of last resort have overturned legislative damage "caps" as a violation of the constitutional right to trial by jury. *See Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989); *Kansas Malpractice Victims Coalition v. Bell, supra*.

but by a delegation of the state's lawmaking power to the wrongdoer, which is given the purely procedural option of electing whether its victim will recover the full measure of his or her actual losses, or something considerably less.

Most respectfully, the defendant cannot possibly show a "countervailing state interest of overriding significance" which would justify the harsh and arbitrary deprivation imposed upon the innocent child whose arm was amputated as a result of its malpractice in this case, simply because it chose to admit its negligence rather than face a jury of its peers. We therefore respectfully submit that the statutes in issue here also violate the procedural due process guarantee of the Fourteenth Amendment.

CONCLUSION

For all of these reasons, it is respectfully urged that a writ of certiorari should issue to review the decision and judgment of the Supreme Court of Florida.

Respectfully submitted,

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Supreme Court, U.S.
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93-221

No. _____

In The

Supreme Court of the United States

October Term, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of Florida

No. 78,210

UNIVERSITY OF MIAMI, etc., Appellant,

vs.

PATRICIA ECHARTE, etc., et al., Appellees.

[May 13, 1993]

HARDING, J.

We have for review *University of Miami v. Echarte*, 585 So.2d 293 (Fla. 3d DCA 1991), in which the Third District Court of Appeal affirmed the trial court's ruling that sections 766.207 and 766.209, Florida Statutes (Supp. 1988), violated the Florida Constitution. We have jurisdiction based on Article V, section 3(b)(l) of the Florida Constitution.

The issue here is whether sections 766.207 and 766.209, which provide a monetary cap on noneconomic damages in medical malpractice claims when a party requests arbitration, violate a claimant's right of access to the courts.[1] We find that the statutes at issue provide a commensurate benefit to the plaintiff in exchange for the monetary cap, and thus, we hold the statutes satisfy the right of access to the courts test set forward in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

[1] Art. I, § 21, Fla. Const.

The University of Miami[2] (University) treated Patricia Echarte, a minor, for a brain tumor. However, as a result of the University's alleged negligence, Patricia's right hand and forearm had to be amputated in order to save her life. Patricia and her parents (Echartes) gave the University notice of intent to initiate a malpractice action.[3] In response, the University requested that the Echartes submit their damages to a medical negligence arbitration panel pursuant to section 766.207(2). The Echartes filed an action for a declaratory judgment questioning the constitutionality of sections 766.207 and 766.209.

The trial court ruled that the statutes violated the Echartes' constitutional right of access to the courts, right to trial by jury,[4] equal protection guarantees,[5] and procedural and substantive due process rights;[6] violated the single subject requirement;[7] constituted a taking without compensation;[8] and involved an improper delegation of authority.[9] On appeal the district court affirmed the trial court's holding, but limited its discussion to the right of

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[2] The University of Miami d/b/a The University of Miami School of Medicine, a Florida Corporation.

[3] Echarte filed notice of intent pursuant to section 766.106, Florida Statutes (Supp. 1988).

[4] Art. I, § 22, Fla. Const.

[5] Art. I, § 2, Fla. Const.; U.S. Const. amend. XIV, § 1.

[6] Art. I, § 9, Fla. Const.; U.S. Const. amend XIV, § 1.

[7] Art. III, § 6, Fla. Const.

[8] Art. X, § 6(a), Fla. Const.

[9] Art. II, § 3, Fla. Const.

access to the courts.[10] Similarly, we limit our discussion to the validity of the statutes under the right of access to the courts. However, we have also considered the other constitutional claims and hold that the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the nondelegation doctrine.

The Legislature enacted the statutory scheme at issue following the recommendations and study made by the Academic Task Force for Review of the Insurance and Tort Systems (Task Force).[11] In studying medical malpractice insurance costs, the Task Force found that the

> primary cause of increased malpractice premiums has been the substantial increase in loss payments to claimants and not excessive insurance company profits nor the insurance industry underwriting cycle. Further, the Task Force found that the dramatic increase in the size or amounts of paid claims was the major cause of the increase in total claims payments; the frequency of claims against physicians increased

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[10] The district court expressly declined to discuss the trial court's other constitutional rulings.

[11] The Legislature established the Task Force in the Tort Reform and Insurance Act of 1986. Ch. 86-160, § 63, Laws of Fla. The Legislature based its findings on the Task Force's reports. Chapter 88-1, Laws of Florida, amended and reenacted by Chapter 88-277, Laws of Florida. The Task Force's reports are: Preliminary Fact-Finding Report on Medical Malpractice, Aug. 14, 1987; Medical Malpractice Reform Alternatives, Oct. 2, 1987; Medical Malpractice Recommendations, Nov. 6, 1987; and Final Recommendations, March 1, 1988.

> only slightly. In particular, the size and increasing frequency of the very large claims were found to be a problem. Finally, attorneys' fees and other litigations costs were found to represent approximately 40 percent of the total costs of insurance companies, while claimants received 43.1 percent of the insurers' total incurred costs. During the past eleven years, the average cost of defending a malpractice claim had increased at an annual compound rate of seventeen percent.

Academic Task Force for Review of the Insurance and Tort Systems. Medical Malpractice Recommendations at 10-11 (Nov. 6, 1987)(footnotes omitted)(on file with H.R. Comm. on Ins., The Capitol). The Task Force recommended implementation of a medical malpractice plan designed to stabilize and reduce medical liability premiums. The recommended plan included that parties conduct a reasonable investigation preceding malpractice claims and defenses in order to eliminate frivolous claims and defenses, and incentives for parties to arbitrate medical malpractice claims in order to reduce litigation expenses. The Legislature adopted the Task Force's recommendations and findings in chapter in chapter [sic] 88-1, Laws of Florida,[12] and section 766.201, Florida

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[12] Chapter 88-1, Laws of Florida, provides:

WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and

WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their noneconomic losses, and

Statutes (Supp. 1988).[13] The statutes at issue are two components recommended by the Task Force to address

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WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and

WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and

WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and

WHEREAS, the Legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, NOW, THEREFORE,. . . .

[13] Section 766..201, Florida Statutes (Supp. 1988), provides in pertinent part:

the medical liability insurance crisis: 1) a presuit investigation process to eliminate frivolous claims, and 2) a voluntary arbitration process to encourage settlement of claims.

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(1) The Legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

(2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.

(a) Presuit investigation shall include:

1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

Sections 766.203-.206 set out the presuit investigation procedure that both the claimant and defendant must follow before a medical negligence claim may be brought in court. The first step in the presuit investigation is for the claimant to determine whether reasonable grounds exists to believe that a defendant acted negligently in the claimant's care or treatment, and that this negligence caused the claimant's injury. § 766.203(2), Fla. Stat. (Supp. 1988). Section 766.203(2) also requires that the medical negligence claim be corroborated by a "verified written medical expert opinion" before giving notice to a defendant. After the claimant has established the reasonable grounds to believe that negligence occurred, the defendant or defendant's insurer is required to conduct a presuit investigation. § 766.203(3), Fla. Stat. (Supp. 1988).

If the claimant's reasonable grounds for the medical negligence claim are intact at the completion of the presuit investigation, either party may request that a medical arbitration panel determine the amount of damages.

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2. Medical corroboration procedures.

(b) Arbitration shall provide:

1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

§ 766.207(2), Fla. Stat. (Supp. 1988). Section 766.207 provides that upon such request, the opposing party's agreement to participate in arbitration binds both parties to the arbitration panel's decision, and precludes other remedies by the claimant against the defendant.

Under section 766.207(7) a claimant can recover net economic damages of past and future medical expenses and eighty percent of lost wages and earning capacity. The claimant's noneconomic damages[14] are "limited to a maximum of $250,000 per incident," and are "calculated on a percentage basis with respect to capacity to enjoy life."[15] § 766.207(7). Finally, section 766.211, Florida Statutes (Supp. 1988), provides for prompt payment of the award to the claimant, including interest at the legal rate and a penalty rate if the defendant fails to pay within ninety days of the award.

Section 766.207(7) holds the defendant responsible for the prompt payment of the arbitration award and interest on all accrued damages, payment of the claimant's reasonable attorney's fees and costs as determined

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[14] Noneconomic damages are defined as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses." § 766.202(7), Fla. Stat. (Supp. 1988).

[15] Section 766.207(7)(b), Florida Statutes (Supp. 1988), gives the following example of how this calculation is made: If the arbitration panel finds that the "claimant's injuries resulted in a 50-percent reduction in [his or her] capacity to enjoy life [such a finding] would warrant an award of not more than $125,000 noneconomic damages."

by the arbitration panel up to fifteen percent of the award, and payment of all arbitration costs. In addition, section 766.207(7)(h) holds each defendant participating in the arbitration proceeding jointly and severally liable for all damages assessed by the panel. Section 766.207(7)(k) provides that if a defendant rejects a claimant's offer to arbitrate, then section 766.209(3), Florida Statutes (Supp. 1988), applies; and if a claimant rejects a defendant's offer to arbitrate, then section 766.209(4), Florida Statutes (Supp. 1988) applies.

Section 766.209(3) provides that if the defendant refuses arbitration, the claimant proceeds to trial without any limitation on damages and is entitled to receive reasonable attorney's fees up to twenty-five percent of the award. Section 766.209(4) provides that if a claimant refuses a defendant's offer to arbitrate, then a claimant proceeds to trial; however, noneconomic damages are capped at $350,000 per incident.

The seminal case in a constitutional challenge to the right of access to courts is *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). In *Kluger*, this Court invalidated a statute requiring a minimum of $550 property damages arising from an automobile accident before bringing an action. This Court held that:

> [w]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing

> a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger 281 So. 2d at 4. Based upon the *Kluger* test, this Court has also invalidated a portion of a tort reform statute that placed a cap on all noneconomic damages in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), because the statute did not provide claimants with a commensurate benefit. *Id.* at 1088. Thus, the law is clear that the Legislature cannot restrict damages by either enacting a minimum damage amount or a monetary damage cap without meeting the *Kluger* test. *Id.*

The initial question in the instant case is whether the arbitration statutes, which include the non-economic damage caps found in sections 766.207 and 766.209, provide claimants with a "commensurate benefit" for the loss of the right to fully recover non-economic damages. Sections 766.207 and 766.209 only limit a claimant's right to recover non-economic damages after a defendant agrees to submit the claimant's action to arbitration. The defendant's offer to have damages determined by an arbitration panel provides the claimant with the opportunity to receive prompt recovery without the risk and uncertainty of litigation or having to prove fault in a civil trial. A defendant or the defendant's insurer is required to conduct an investigation to determine the defendant's liability within ninety days of receiving the claimant's notice to initiate a malpractice claim. § 766.106(3)(a). Before the defendant may deny the claimant's reasonable

grounds for finding medical negligence, the defendant must provide a verified written medical expert opinion corroborating a lack of reasonable grounds to show a negligent injury. § 766.203(3)(b). The claimant benefits from the requirement that a defendant quickly determine the merit of any defenses and the extent of its liability. The claimant also saves the costs of attorney and expert witness fees which would be required to prove liability. Further, a claimant who accepts a defendant's offer to have damages determined by an arbitration panel receives the additional benefits of: 1) the relaxed evidentiary standard for arbitration proceedings as set out by section 120.58, Florida Statutes (1989); 2) joint and several liability of multiple defendants in arbitration; 3) prompt payment of damages after the determination by the arbitration panel; 4) interest penalties against the defendant for failure to promptly pay the arbitration award; and 5) limited appellate review of the arbitration award requiring a showing of "manifest injustice."

We reject the district court's conclusion that the medical malpractice arbitration statutes do not provide a claimant with commensurate benefits. The district court found that because the medical malpractice arbitration statutes do not provide a nofault basis for recovery or mandatory insurance coverage to assure recovery, like workers' compensation laws, the arbitration statutes did not provide a commensurate benefit. The district. court's conclusion fails to recognize that medical malpractice arbitration statutes are less restrictive than the workers' compensation statutes, and that the Task Force specifically considered and rejected both a no-fault alternative system of compensation and a mandatory insurance pool

as means to control increases in the medical malpractice insurance rates.[16]

We find that a claimant's rights are restricted less by the medical malpractice arbitration statutes than by the workers' compensation statutes. Unlike a claimant under the workers' compensation statute, a claimant under the medical malpractice arbitration statutes may recover some non-economic damages. Furthermore, in considering a no-fault system, the Task Force stated that for most medical injuries

> the Task Force does not recommend a no-fault compensation alternative to the tort system. This negative conclusion is compelled by findings that a comprehensive no fault system for all medical injuries would be prohibitively expensive, many times more expensive than the existing medical malpractice systems. In order to develop a no-fault system at reasonable cost, it is necessary to establish a framework for distinguishing compensable events from noncompensable events. In most areas of medical injury, this is not economically feasible at the present time. For example, defining the compensable event for a no-fault plan to cover medical injuries in emergency rooms and trauma centers would require terms broad enough to include injuries of every degree to any part of the body resulting from an unlimited variety of medical interventions. Because of its expansive potential, such a broad definition of the compensable

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[16] The Task Force recommended a no-fault compensation alternative in the narrow area of birth related neurological injuries, but rejected it for other types of medical injuries. Medical Malpractice Recommendations at 31.

> event would make no-fault insurance costs prohibitively expensive, at worst, and impossible to predict, at best.

Medical Malpractice Recommendations at 31-32. The Task Force also rejected a proposal which would require all physicians to buy into a state-operated insurance pool in order to provide a mandatory first layer of medical malpractice insurance. The Task Force explained that such a plan "could effectively destroy any existing vitality and competitiveness in the private market for medical malpractice insurance in the state of Florida." Medical Malpractice Recommendations at 49. Further, the Task Force noted that placing all physicians in a state-operated insurance pool would have the effect of charging physicians who practice in low-risk areas of medicine higher premiums in order to subsidize the high cost of premiums for physicians who practice in high-risk areas. The Task Force specifically rejected such mandatory insurance plans as being overly intrusive into the insurance market and economically undesirable. *Id.*

The Task Force's recommendations to the Legislature not to adopt a no-fault system or mandatory insurance program are based on an extensive study of the complex causes of the increases in medical malpractice insurance rates. According to the Task Force's report the solutions the Legislature implemented to meet the workers' compensation problem are not effective to answer the medical malpractice insurance liability crisis. The unique facts surrounding medical malpractice required the Legislature to tailor a different solution to solve the crisis. Thus, the district court erred in holding that the medical arbitration statutes did not provide a commensurate benefit because

the arbitration statutes did not provide the same benefits as the workers' compensation statutes.

Even if the medical malpractice arbitration statutes at issue did not provide a commensurate benefit, we would find that the statutes satisfy the second prong of *Kluger* which requires a legislative finding that an "overpowering public necessity" exists, and further that "no alternative method of meeting such public necessity can be shown." *Kluger*, 281 So. 2d at 4. The determination of whether the Legislature made a showing of an "overpowering public necessity" must be interpreted in light of our previous line of cases addressing the Legislature's attempts to abolish other causes of action.

In *Kluger*, the Court discussed an earlier decision, *Rotwein v. Gersten*, 160 Fla. 736, 36 So. 2d 419 (1948), which upheld the Legislature's abolishment of the common law rights that provided for causes of action for alienation of affections, criminal conversation, seduction, and breach of contract to marry. The Court in *Rotwein* found that the preface to the Florida Statute abolishing these causes of action stated that they had "been subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free from wrongdoing." *Id.* at 738, 36 So. 2d at 420. The court stated that these causes of actions had "become an instrument of extortion and blackmail" and therefore the Legislature could abolish them. *Id.* at 739, 36 So. 2d at 421. This Court in *Kluger* interpreted the language from *Rotwein* as the legislative showing that a "public necessity" existed for the abolishment of the right to sue. *Kluger*, 281 So. 2d at 4.

The Court in *Kluger* held that the Legislature had not shown an "overpowering public necessity" to abolish the right to sue an automobile tortfeasor for property damage. In fact, chapter 71-252, Laws of Florida, which enacted the challenged statute in *Kluger*, did not contain any factual or policy determinations to support the existence of an "overpowering public necessity." Recently in *Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992), this Court found that the Legislature showed an "overpowering public necessity" in the preamble to the challenged statutes. *Id.* at 424 n. 7.

In the instant case, the Legislature set out its factual findings in the preamble of chapter 88-1, which initially enacted the Task Force's recommendations. In fact, the preamble in chapter 88-1 states in part:

> [I]t is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be unable to recover damages for either their economic losses or their non-economic losses. . . .

Ch. 88-1. This preamble clearly states the Legislature's conclusion that the current medical malpractice insurance crisis constitutes an "overpowering public necessity." Moreover, the Legislature made a specific factual finding that "[m]edical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased unavailability of malpractice insurance for some physicians." § 766.201(1)(a).

The Legislature's factual and policy findings are supported by the Task Force's findings in its report. *See*

Academic Task Force for Review of the Insurance and Tort Systems, Preliminary Fact-Finding Report on Medical Malpractice (Aug. 14, 1987)(hereinafter Fact-Finding Report.)[17] Among its many findings, the Task Force found that: 1) a family physician who performs no surgery and practiced outside Dade and Broward Counties saw a 229% increase in medical malpractice insurance premiums for the period of 1983 to July 1, 1987; and 2) a family physician who performs no surgery and practices in Dade or Broward County saw a 300% increase in medical malpractice insurance premiums for the same period. Furthermore, the Task Force found that rates for specialities [sic] also increased sharply. For example, the rates for obstetricians increased by 444% in Dade and Broward Counties, as compared to 304% in the rest of the

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[17] The Task Force stated in the Fact-Finding Report that its full-time research staff based their findings on the following: 1) seven public meetings and hearings in Tampa and Miami to receive presentations, recommendations and comments from experts and interested citizens; 2) a comprehensive literature search and review; and 3) eight research projects conducted in Florida which surveyed medical malpractice claims, closed claims, loss payments, profitability and other aspects of the insurance companies; studied data from the Insurance Services Office, a non-profit organization which collects data and files rate applications for liability carriers nationwide; a survey of 1,500 randomly selected physicians; a survey of 1,500 attorneys who regularly handle tort cases; conducted a computer analysis of the financial situation of commercial liability insurance carriers; and an analysis of Florida's civil litigation rates. The Academic Task Force then conducted a six-hour hearing in Gainesville to preview the preliminary findings from the eight research projects. Fact-Finding Report at 23-24.

state.[18] These facts support the Legislature's conclusion that increased costs in medical malpractice insurance premiums have resulted in increased health care costs and made liability insurance "functionally unavailable" for some physicians.[19]

In the instant case, the district court held that "the legislature has not demonstrated the requisite overpowering public necessity for restricting claimant's non-economic damages." *Echarte*, 585 So. 2d at 301. We disagree. The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. *See American Liberty Ins. Co. v. West & Conyers Architects & Engineers*, 491 So. 2d 573 (Fla. 2d DCA 1986). Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous. *See State v. Division of Bond Finance*, 495 So. 2d 183 (Fla. 1986); and *Miami Home Milk Producers Ass'n v. Milk Control Board*, 124 Fla. 797, 169 So. 541 (1936). Because the Legislature's factual and policy findings are presumed correct and there has been no showing that the findings in the instant case are clearly erroneous, we hold that the Legislature has shown that an "overpowering public necessity" exists.

The next question is whether "no alternative method" for meeting the public necessity can be shown. *Kluger*, 281 So. 2d at 4. The district court held that the Legislature did not satisfy the second prong of the Kluger test because the "legislature did not expressly find that

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[18] Fact-Finding Report at 26-31.

[19] Fact-Finding Report at 36, 239-40.

no alternative method existed." *Echarte*, 585 So. 2d at 301. We disagree and find that the record supports the conclusion that no alternative or less onerous method exists.

The Task Force's recommendations to the Legislature concerning solutions to the medical malpractice insurance crisis included "civil justice reforms, strengthened regulation of the medical profession and a proposal to provide immediate relief for physicians who experience genuine financial difficulty as a result of high premiums." Medical Malpractice Recommendations at 9. The Task Force stated that it believed that "reforms of the civil justice system, of the medical regulatory system, and of the insurance system complement each other" and that "[a]ll are necessary to address the complex problems with multiple causes analyzed in the *Preliminary Fact-Finding Report on Medical Malpractice*." Medical Malpractice Recommendations at 9. The conclusion that no alternative or less onerous method of meeting the public necessity is supported by the Legislature's actions in adopting both the Task Force's recommendations to enact the arbitration statutes and strengthen regulation of the medical profession. Therefore, in determining whether no alternative means exists to meet the public necessity of ending the medical malpractice crisis, the plan as a whole, rather than focusing on one specific part of the plan, must be considered.

The Echartes dispute the conclusion that the arbitration statutes are the only alternative means to reduce the medical malpractice insurance rates. They point out that the Task Force's findings show that from 1975 to 1986, approximately 4% of all practicing physicians had two or more claims, but were responsible for 42.2% of the total

amount of paid claims. Fact-Finding Report at 144. Thus, the Echartes conclude that an alternative method to reducing claims would be to strengthen professional discipline of physicians with numerous claims.

The reduction of the frequency and severity of malpractice would certainly diminish the amount of loss payments and subsequently medical malpractice rates. However, the Echartes' conclusion that professional discipline alone is an alternative method to meet the public necessity of controlling medical malpractice insurance premiums is erroneous. The Task Force specifically stated that even though a small percentage of the physicians were responsible for 42.2% of the total claims paid out, the facts did not support the conclusion that these doctors were incompetent. As the Task Force found:

> There are a number of reasons why a physician with multiple claims should not be considered a "bad" doctor. Multiple claims could occur because a physician is practicing in a high risk speciality or a high risk area of the state. In addition, some physicians may be more willing to treat high risk patients for which unfavorable results are to be expected more frequently.

Fact-Finding Report at 142. Moreover, the The [sic] Task Force specifically found that:

> Strengthened regulation of medical care providers is not a substitute for tort and insurance reform, but does complement other reforms. The Task Force does not believe that the Legislature is faced with a choice between civil justice reform and strengthened regulation of physicians. Rather, effective reform must include both.

Medical Malpractice Recommendations at 37. Thus, it is clear that both the arbitration statute, with its conditional limits on recovery of non-economic damages, and the strengthened regulation of the medical profession are necessary to meet the medical malpractice insurance crisis. Further, no alternative or less onerous method of meeting the crisis has been shown. Therefore, we hold that the second prong of *Kluger* is satisfied.

Accordingly, we hold that sections 766.207 and 766.209 are constitutional. The district court's decision is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

OVERTON, McDONALD and GRIMES, JJ., concur.
BARKETT, C.J., dissents with an opinion, in which SHAW, J., concurs.
SHAW, J., dissents with an opinion, in which BARKETT, C.J., concurs.
KOGAN, J., recused.

BARKETT, C.J., dissenting.

I agree with Justice Shaw that the statutes in question violate article I, section 21 of the Florida Constitution. I also believe the statutes violate the right to trial by jury and the equal protection clauses of the Florida and United States Constitutions.

As the trial court noted, under the statutory scheme plaintiffs must elect between arbitration and their right to a trial by jury, which is guaranteed by article I, section 22 of the Florida Constitution. If seriously injured plaintiffs choose to go to trial, their noneconomic damages are

arbitrarily capped at $350,000. In *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), this Court stated that the constitutional guarantee of access to courts must be read in conjunction with the right to a jury trial:

> Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the Legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.

Id. at 1088-89. The reasoning in *Smith* is equally applicable to the arbitrary damage caps at issue in this case.

The statutes also violate equal protection guarantees by creating two classes of medical malpractice victims, those with serious injuries whose recovery is limited by the caps and those with minor injuries who receive full compensation. This Court has made clear that similarly situated persons are equal under the law and must be treated alike. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987); *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 18 (Fla. 1974). Statutory classifications at a minimum must bear some reasonable relationship to a permissive legislative objective and not be discriminatory, arbitrary, or oppressive. *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991).

I fail to see how singling out the most seriously injured medical malpractice victims for less than full

recovery bears any rational relationship to the Legislature's stated goal of alleviating the financial crisis in the medical liability insurance industry. Ch. 88-1, Preamble, Laws of Fla. (amended and reenacted ch. 88-277, Laws of Fla.); *See Florida Medical Center, Inc. v. Von Stetina*, 436 So. 2d 1022, 1027 (Fla. 4th DCA 1983), *rev'd on other grounds sub nom. Florida Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985). Such a classification offends the fundamental notion of equal justice under the law and can only be described as purely arbitrary and unrelated to any state interest. *Vildibill v. Johnson*, 492 So. 2d 1047, 1050 (Fla. 1986).

Moreover, the Task Force's Medical Malpractice Recommendations, which were relied on by the Legislature in enacting the noneconomic damage caps, do not establish an "overwhelming public necessity" for restricting the access to courts. Nor do the recommendations show that no reasonable alternative exists. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

Indeed, the recommendations conclude that reducing medical negligence is the best way to resolve the medical malpractice insurance "crisis" and state that inadequate discipline of physicians contributes substantially to the problem:

> Obviously, *a reduction in the occurrence of medical injuries is the most desirable manner in which to reduce the costs of the medical malpractice systems.* In its *Preliminary Fact-Finding Report on Medical Malpractice*, the Task Force found that nearly one half the amount of paid claims during the period 1975 through 1986 was accounted for by

> physicians with two or more paid claims. Further, the report concluded that the Department of Professional Regulation disciplines a small percentage of physicians with multiple paid claims.

Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations, at 13 (Nov. 6, 1987) (emphasis supplied). When the problems in the medical malpractice insurance industry arguably can be eased by means much less onerous than restricting the rights of victims of established medical malpractice to redress their injuries, I cannot find that "no alternative method" has been shown.[20] *Kluger*, 281 So. 2d at 4; *Overland Construction Co. v. Sirmons*, 369 So. 2d 572, 574 (Fla. 1979).

For the reasons stated above, I would find the statutes unconstitutional.

SHAW, J., concurs.

Shaw, J., dissenting.

I agree with the courts below that sections 766.207 and 766.209, Florida Statutes (Supp. 1988), fail the test enunciated in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), and violate the claimant's right of access to the courts, guaranteed by article I, section 21 of the Florida Constitution. We have said repeatedly that before the constitutionally guaranteed right of access to courts can be taken away, a

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[20] The fact that numerous sections of the medical malpractice reform legislation *were* directed at regulation, discipline, and prevention of malpractice is immaterial. Those sections, if anything, demonstrate the Legislature's recognition of alternative methods.

reasonable alternative must be provided, or the Legislature must show an overpowering public necessity for the abolishment of such right and no alternative method of meeting such public necessity. *Kluger,* 281 So. 2d at 4. We held in *Smith:*

> Neither restriction [on the right of access to courts] is permissible unless one of the *Kluger* exceptions is met; i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of *overpowering public necessity* for the abolishment of the right *and no alternative method* of meeting such public necessity.

Smith v. Department of Ins., 507 So. 2d 1080, 1088 (Fla. 1987) (emphasis added).

In the instant case, all agree that the constitutional right of access to courts is being denied and therefore the *Kluger* test must be met. I disagree with the majority that the statutes provide a reasonable alternative remedy or commensurate benefit to Patricia Echarte in exchange for her common-law right to full "redress for injuries." *Kluger,* 281 So. 2d at 4. Workers' compensation and no-fault automobile statutes were found to be constitutional because they require compulsory insurance coverage and relieve the claimant of the burden of proving fault. *See Martinez v. Scanlan,* 582 So. 2d 1167 (Fla. 1991); *De Ayala v. Florida Farm Bureau Cas. Ins. Co.,* 543 So. 2d 204 (Fla. 1989); *Smith; Lasky v. State Farm Ins. Co.,* 296 So. 2d 9 (Fla. 1974). The statutory scheme here differs in that it requires the claimant to "conduct an investigation to ascertain that there are reasonable grounds to believe that . . . [a]ny named defendant in the litigation was negligent" (i.e.,

that there was a breach of a duty owed), and that such negligence "resulted in injury to the claimant" (damages). § 766.203(2), Fla. Stat. (Supp. 1988). The statute also mandates that "[c]orroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert." *Id.* Despite these additional statutory burdens placed upon the claimant, there is no quid pro quo such as requiring the defendant to secure compulsory insurance to assure the claimant a recovery in the event that medical negligence is proved.[21] In other words, the statute makes it more burdensome to sue for medical negligence without providing an assured recovery. The quid pro quo that saved workers' compensation and no-fault automobile statutes from constitutional defect is absent here.

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[21] The district court correctly noted that:

> Here, a defendant retains causation defenses and the claimant must demonstrate reasonable grounds to initiate medical negligence litigation, § 766.203(2), Fla. Stat. (Supp. 1988), through an extensive presuit investigation procedure. §§ 766.106, .203-.206, Fla. Stat. (Supp. 1988); *see* Fla. R. Civ. P. 1.650. Thus, although defendant agrees to pay certain damages following presuit screening, the statute does not provide a no-fault basis for recovery. Additionally, because insurance coverage is not mandated, defendant's immunity from liability for non-economic damages in excess of the cap is not dependent on insurance coverage and claimant is not assured recovery of its allowable losses.

University of Miami v. Echarte, 585 So. 2d 293, 299 (Fla. 3d DCA 1991) (footnote omitted).

The majority opines that the legislative advantages fall evenly, or at least fairly, upon the injured child and the tortfeasor in this case. I strongly disagree. No amount of bootstrapping or divining legislative intent can obscure reality. To recite that the Legislature had its reasons for failing to provide for compulsory insurance simply begs the question of whether a quid quo pro has been provided. In the absence of compulsory insurance, to assert that prompt payment of damages is ensured is simply fictive.

Equally fictive is the claim that a "relaxed evidentiary standard" is a benefit to the claimant. No analysis is offered to shore up this assertion. The majority has confused a relaxed standard of proof, an advantage to the one who must bear the burden of proof, with a relaxed standard of admitting evidence, an advantage enjoyed equally by all parties. Our courts have made clear that regardless of a relaxed standard of admitting evidence, conclusions must be supported by competent, substantial evidence. *See, e.g., State, Dep't of Admin. v. Porter,* 591 So. 2d 1108, 1109 (Fla. 2d DCA 1992); *McDonald v. Department of Banking & Finance,* 346 So. 2d 569, 585 (Fla. 1st DCA 1977). Thus a relaxed standard of admitting evidence is irrelevant to the quid pro quo evaluation.

The negligent party can unilaterally limit the claimant's non-economic damages, § 766.207(2), whether the claimant accepts arbitration, § 766.207(7)(b), or goes to trial. § 766.209(4)(a). The instant statute presents the classic case of "heads I win, tails you lose." The district court correctly observed that the benefits of the statutes are not balanced between the patient-claimant and the tortfeasor: a medical patient obtains no particular benefit from a cap

placed on noneconomic damages. The benefit of the damage cap inures only to the negligent defendant. *University of Miami v. Echarte*, 585 So. 2d 293, 299 (Fla. 3d DCA 1991) (citing *Smith*, 507 So. 2d at 1088). Again this is in contrast to the no-fault automobile reparations statutes, where benefits are balanced among all auto owners because an auto owner is as likely to be negligent as to be the victim of another's negligence.

Convinced that no reasonable alternative is provided in exchange for the right taken away, I turn my attention to whether the alternative prong of the *Kluger* test has been satisfied – has the Legislature "shown" "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity"? *Kluger*, 281 So. 2d at 4; *Smith*, 507 So. 2d at 1088. I read "shown" to mean "shown by competent, substantial evidence." Here the Legislature has shown neither an overpowering public necessity to cap noneconomic damages nor the absence of an alternative method. The Legislature failed to make such showing despite numerous "whereas" clauses in the adopting legislation, including "findings."[22] Significantly, the final report of the Task Force, the document on which the Legislature bases its findings, does not posit a cap on noneconomic damages as the sole solution to the crisis in

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[22] "Findings" must be supported by competent, substantial evidence. Therefore whether "findings," in the language of the legislature, and "showings," in the language of *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), are synonymous is irrelevant.

the medical insurance industry.[23] In fact, it expressly cautions against unwarranted conclusions.[24] There is thus an absence of competent, substantial evidence showing that no alternative method of meeting an overpowering public necessity exists. The majority recites the reasons why the Legislature chose the method it did, as if this recitation were an adequate substitute for the required *Kluger* findings. It is not. Indeed the task force points to other methods of meeting the alleged public necessity, i.e., vigilant management of medical malpractice. *See* Academic Task Force for Review of the Insurance and Tort

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[23] The district court, in concluding that the Legislature had not demonstrated the requisite overpowering public necessity for restricting claimant's noneconomic damages, correctly observed:

> Although the Task Force found that the "high-end awards are a substantial cause of the increase in paid losses," Medical Malpractice Recommendations, at 26; it failed to differentiate between economic and noneconomic damage awards. Its findings concerning prospective reduction of approximately 2.4% to 11% in loss payments are based on "hypothetical assumptions (rather than empirical data) as to the distribution of economic and noneconomic losses in past paid claim data." Final Recommendations at 62.

Echarte, 585 So. 2d at 301 (citation omitted).

[24] As noted by the district court:

> The Task Force warned that the "figures are offered only for what they say about relative magnitude [of savings from a cap on medical claims to savings from a cap on other liability claims]. They should not be misinterpreted as vouching for the amount of savings that might be realized from caps on noneconomic damages." Final Recommendations at 63.

Echarte, 585 So. 2d at 301.

Systems, Medical Malpractice Recommendations 13 (November 6, 1987) (calling for a "comprehensive reform package designed to strengthen professional regulation of the medical profession," creating a division within the Florida Department of Professional Regulation to "assume comprehensive responsibility for medical professional discipline and quality assurance"). The fact that the Legislature considered and rejected other methods is additional proof that the *Kluger* test has not been met. We said in *Kluger*:

> [We cannot] adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, *or when an alternative approach is available.*
>
> We hold, therefore, . . . the Legislature is without power to abolish such a right . . . unless the Legislature can show an overpowering public necessity for the abolishment of such right, and *no alternative method* of meeting such public necessity can be shown.

Kluger, 281 So. 2d at 4-5 (emphasis added). The majority engrafts a new "no less onerous method" test onto the established "no alternative method" test. Majority op. at 19. This is a departure from the *Kluger* test, which is an admittedly burdensome test. This is however as it should be when a constitutionally guaranteed right is being taken away. It also departs from our recent decision in *Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992), where we held a statute unconstitutional because although an overpowering public necessity was shown, the record failed to show that the solution adopted by the Legislature was "the only method meeting the medical

malpractice crisis and encouraging peer review." *Id.* at 425. The majority offers no authority for its departure from the holding of *Siegel* and *Kluger.*

The majority also erroneously implies that it is the Echartes' burden to show that no alternative method of meeting a public necessity exists. Majority op. at 19, 21. We have held however that the *Legislature* bears this burden. We said in *Smith*:

> In *Kluger,* the legislature attempted to unconstitutionally restrict the right of redress at the bottom of the damage spectrum; here, it attempts to restrict the top of the spectrum. Neither restriction is permissible unless one of the *Kluger* exceptions is met; i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) *legislative showing* of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such public necessity.

Smith, 507 So. 2d at 1088 (emphasis added).

The majority's naked assertion that "we have also considered the other constitutional claims and hold that the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or an improper delegation of power" majority opinion at 3, is devoid of analysis. I can with equal force assert that I have "considered the other constitutional claims" and find them all persuasive.

The law requires that when a statutory benefit is being given in lieu of a constitutionally protected right

the statutory benefit must accrue to the particular claimant, not to the public at large. We held in *Smith* that a general assertion of benefits will not pass constitutional muster. 507 So. 2d at 1089. A benefit enjoyed by the general public at the expense of a particular claimant is a taking of the claimant's property without compensation, in violation of the state and federal constitutions. Art. I, § 9, art. X, § 6(a), Fla. Const.; U.S. Const. amends. V, XIV; *see Dade County v. Still*, 377 So. 2d 689 (Fla. 1979) (ordinance taking portion of respondents' property for public good cannot be used to reduce compensation).

Finally, the statutes deny equal protection, for the reasons ably set out by Chief Justice Barkett in her dissent, and draw an arbitrary line between recovery and nonrecovery without regard to the actual damages caused by a defendant's malpractice. By allowing the less seriously injured to recover full damages while denying full compensation to the more seriously injured, the statutes operate with increasing capriciousness as the severity of the injury increases – the greater the injury the greater the deprivation of recovery.

For these many reasons I would approve the decisions of the trial and district courts.

BARKETT, C.J., concurs.

An Appeal from the District Court of Appeal – Statutory or Constitutional Invalidity

Third District – Case No. 90-982

(Dade County)

Steven E. Stark and Michael L. Friedman of Fowler, White, Curentt [sic], Hurley, Banick & Strickroot, P.A., Miami, Florida,

for Appellant

Joel D. Eaton and Joel S. Perwin of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, Florida; and Grossman & Roth, P.A., Miami, Florida,

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Julian Clarkson of Holland & Knight, Tallahassee, Florida; and David W. Spicer of Bobo, Spicer, Ciotoli & Fulford, West Palm Beach, Florida,

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Amicus Curiae for the Association of Trial Lawyers of America

Roy D. Wasson, Miami, Florida,

Amicus Curiae for the Academy of Florida Trial Lawyers

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1991

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,	**	
Appellant,	**	CASE NO. 90-982
vs.	**	
PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,	**	
Appellees.	**	

Opinion filed June 11, 1991.

An Appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge.

Fowler, White, Burnett, Hurley, Banick & Strickroot and Steven E. Stark and Michael L. Friedman, for appellant.

Grossman & Roth; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel Eaton and Joel Perwin, for appellees.

Blackwell & Walker and James E. Tribble, for Florida Defense Lawyers Association, as amici curiae.

Stephens, Lynn, Klein & McNicholas and Debra J. Snow, for Florida Hospital Association and Florida Medical Association, as amici curiae.

Robert A. Butterworth, Attorney General, and Louis F. Hubener, Assistant Attorney General, for State of Florida, as amici curiae.

Before NESBITT, BASKIN and JORGENSON, JJ.

BASKIN, Judge.

The University of Miami[1] [University] appeals a final summary judgment declaring sections 766.207[2] and

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[1] The University of Miami d/b/a The University of Miami School of Medicine, a Florida corporation.

[2] Section 766.207, Florida Statutes (Supp. 1988), provides:

Voluntary binding arbitration of medical negligence claims. –

(1) Voluntary binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28.

(2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in s. 120.58(1)(a).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to

the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation under s. 766.106. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(4) The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative hearing officer furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

(5) The arbitrators shall be independent of all parties, witnesses, and legal counsel, and no officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

(6) The rate of compensation for medical negligence claims arbitrators other than the administrative hearing officer shall be set by the chief judge of the appropriate circuit court by schedule providing for compensation of not less than $250 per day nor more than $750 per day or as agreed by the parties. In setting the schedule, the chief judge shall consider the prevailing rates charged for the delivery of professional services in the community.

(7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that:

(a) Net economic damages shall be awardable,

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including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative hearing officer.

(h) Each defendant who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section.

(i) The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only. A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(j) The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has

766.209,[3] Florida Statutes (Supp. 1988), unconstitutional. We affirm, and in so doing, hold that sections 766.207 and

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made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s. 766.209(4).

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision.
The chief arbitrator shall decide all evidentiary matters. The provisions of this subsection shall not preclude settlement at any time by mutual agreement of the parties.

(8) Any issue between the defendant and the defendant's insurer or self-insurer as to who shall control the defense of the claim and any responsibility for payment of an arbitration award, shall be determined under existing principles of law; provided that the insurer or self-insurer shall not offer to arbitrate or accept a claimant's offer to arbitrate without the written consent of the defendant.

(9) The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212.

(10) Rules promulgated by the Division of Administrative Hearings pursuant to this section, s. 120.53, or s. 120.65 may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by a hearing officer, which is not under judicial review. (Notes omitted).

[3] Section 766.209, Florida Statutes (Supp. 1988), provides: **Effects of failure to offer or accept voluntary binding arbitration. –**

766.209 fail the test enunciated in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), and violate claimant's right of access to the courts.

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(1) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(2) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s. 768.79 or offer of settlement under s. 45.061.

(3) If the defendant refuses a claimant's offer of voluntary binding arbitration:

(a) The claim shall proceed to trial without limitation on damages, and the claimant, upon proving medical negligence, shall be entitled to recover prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. The Legislature expressly finds that such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.

(b) Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent

The University treated Patricia Echarte, a minor, for a brain tumor. As a result of the University's allegedly negligent acts, Patricia's right hand and forearm had to be amputated to save her life. Pursuant to section 766.106, Florida Statutes (Supp. 1988), Patricia and her parents delivered to the University a notice of intent to initiate malpractice litigation. The University served the Echartes with a request for voluntary binding arbitration of damages. § 766.207(2), Fla. Stat. (Supp. 1988). In response, the Echartes filed an action for declaratory judgment to determine the constitutionality of sections 766.207 and 766.209. They argued that those statutes violate the Florida and United States Constitutions. Agreeing with their contentions, the trial court entered summary judgment in their favor. The court ruled that the cited statutes violate the Echartes' constitutional rights of access to the court,[4] rights to trial by jury,[5] equal protection guarantees,[6] and procedural and substantive due process rights.[7] In addition, the trial court decided that the statutes violate the

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of wage loss and loss of earning capacity, offset by any collateral source payments.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(8), and shall be offset by future collateral source payments.

(5) Jury trial shall proceed in accordance with existing principles of law.

[4] Art. I, § 21, Fla. Const.

[5] Art. 1, § 22, Fla. Const.

[6] Art. 1, §(2), Fla. Const.; U.S. Const. amend. XIV, § 1.

[7] Art. 1, § 9, Fla. Const.; U.S. Const. amend XIV, § 1.

single subject requirement of the Florida Constitution,[8] and constitute a taking without compensation,[9] as well as an improper delegation of authority.[10] We affirm the trial court's determination that the statutes deny claimants the right of access to court. We expressly decline to consider the other asserted grounds.

The statutory scheme at issue was enacted in accordance with the recommendations of a study by the Academic Task Force for Review of Insurance and Tort Systems[11] concerning Florida's medical malpractice crisis. The legislature announced the purpose of the legislation in the preamble to chapter 88-1 (amended and reenacted Ch. 88-277, Laws of Florida)[12] and in section 766.201,

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[8] Art. III, § 6, Fla. Const.

[9] Art. X, § 6(a), Fla. Const.

[10] Art. II, § 3, Fla. Const.

[11] The legislature established the Academic Task Force pursuant to the Tort and Insurance Reform Act of 1986. Chap. 86-160, Laws of Florida. The legislature based its findings on the Academic Task Force reports. Ch. 88-1, Laws of Fla. (amended and reenacted ch. 88-277, Laws of Fla.). The reports consist of the Academic Task Force's *Preliminary Fact-Finding Report on Medical Malpractice*, August 14, 1987; *Medical Malpractice Reform Alternatives*, October 2, 1987; *Medical Malpractice Recommendations*, November 6, 1987; and *Final Recommendations*, March 1, 1988.

[12] The preamble provides:

> WHEREAS, the Legislature finds that there is in Florida a financial crisis in the medical liability insurance industry, and
>
> WHEREAS, it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to civil actions will be unable to purchase liability insurance, and many injured persons will therefore be

unable to recover damages for either their economic losses or their noneconomic losses, and

WHEREAS, the people of Florida are concerned with the increased cost of litigation and the need for a review of the tort and insurance laws, and

WHEREAS, the Legislature believes that, in general, the cost of medical liability insurance is excessive and injurious to the people of Florida and must be reduced, and

WHEREAS, the Legislature finds that there are certain elements of damage presently recoverable that have no monetary value, except on a purely arbitrary basis, while other elements of damage are either easily measured on a monetary basis or reflect ultimate monetary loss, and

WHEREAS, the Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions, recognizing that such noneconomic losses should be fairly compensated and that the interests of the injured party should be balanced against the interests of society as a whole, in that the burden of compensating for such losses is ultimately borne by all persons, rather than by the tortfeasor alone, and

WHEREAS, the legislature created the Academic Task Force for Review of the Insurance and Tort Systems which has studied the medical malpractice problems currently existing in the State of Florida, and

WHEREAS, the Legislature has reviewed the findings and recommendations of the Academic Task Force relating to medical malpractice, and

WHEREAS, the Legislature finds that the Academic Task Force has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action. . . .

Florida Statutes (Supp. 1988).[13] The legislature found, *inter alia*, that the excessive and injurious cost of medical

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[13] Section 766.201, Florida Statutes (Supp. 1988) provides, in pertinent part:

> (1) The Legislature makes the following findings:
>
> (a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.
>
> (b) The primary cause of increased medical malpractice liability insurance premiums has been the substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.
>
> (c) The average cost of defending a medical malpractice claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.
>
> (d) The high cost of medical malpractice claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.
>
> . . .
>
> (2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. . . .
>
> . . .
>
> (b) Arbitration shall provide:
>
> 1. Substantial incentives for both claimants and

liability insurance premiums had caused a crisis in Florida's medical liability insurance industry endangering a potential defendant's ability to purchase malpractice insurance and a potential claimant's ability to collect damages for losses. Accordingly, the legislature found that a voluntary binding arbitration plan that included damage limitations would alleviate the crisis.

The trial court held unconstitutional statutes limiting recovery of damages for a claimant's loss of income and loss of earning capacity, and capping a claimant's noneconomic damages[14] in medical malpractice actions when a defendant concedes liability and requests arbitration. Specifically, section 766.207(2) provides for voluntary binding arbitration of medical negligence claims upon election of either party following "completion of presuit investigation with preliminary reasonable grounds for a

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defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

[14] Section 766.202(7), Florida Statutes (Supp. 1988), defines noneconomic damages as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses."

medical malpractice claim intact. . . . " § 766.207(2), Fla. Stat. (Supp. 1988). The remainder of section 766.207 sets forth the procedures and consequences pertaining to the arbitration of claims. Section 766.207(7) delineates the damages claimant is entitled to recover in the arbitration, capping claimant's noneconomic damages at $250,000.[15] Section 766.209 states the consequences of failure to request arbitration, as well as the effect of defendant's or claimant's refusal to accept an offer of binding arbitration. If a claimant rejects arbitration, the matter proceeds to trial and claimant's noneconomic damages are capped at $350,000. § 766.209(4), Fla. Stat. (Supp. 1988). Upon defendant's rejection of claimant's offer to arbitrate, the trial proceeds "without limitation on damages, and the claimant, upon proving medical negligence, shall be entitled to recover prejudgment interest and reasonable attorney's fees up to 25 percent of the award reduced to present value." § 766.209(3)(a), Fla. Stat. (Supp. 1988).

We need not consider all the asserted arguments because we hold that sections 766.207 and 766.209 offend article I, section 21, of the Florida Constitution. *Kluger v. White*, 281 So.2d 1, 3 (Fla. 1973). Article 1, section 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The statutes in question

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[15] That award is "calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages." § 766.207(7)(b), Fla. Stat. (Supp. 1988).

violate that principle. The final judgment states, in relevant part:

> The Court has jurisdiction pursuant to §86.011, Fla. Stat. (1987).
>
> As applied to the facts in this case, the challenged statutes give the admittedly negligent defendant the unilateral right to "cap" the plaintiffs' damage recovery at an amount which is significantly lower than the actual damages which its negligence caused. The statutes provide no reasonable alternative remedy or commensurate benefit to the plaintiffs. The legislature has also failed to demonstrate that this draconian restriction upon the plaintiffs' constitutional right of access to the courts is required by an overpowering public necessity and that no reasonable alternative exists. The challenged statutes therefore violate Article I, §21 of the Florida Constitution. *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).

In *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987), the court held that the test set forth in *Kluger* must be applied to determine whether a statutory scheme restricting noneconomic damages violates article 1, section 21. The *Smith* court held that such a restriction is not permissible "unless one of the *Kluger* exceptions is met: i.e., (1) providing a reasonable alternative remedy or commensurate benefit, or (2) legislative showing of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such public necessity." *Smith*, 507 So.2d at 1088. Applying that test, the *Smith* court concluded that an absolute $450,000 cap on noneconomic damages in personal injury cases did not

meet the first exception and held that it violated claimant's constitutional right of access to the courts.[16]

Addressing the first prong of the *Kluger* test, we hold that the statute before us, examined under the *Smith* and *Kluger* standards, violates article I, section 21 by failing to provide "a reasonable alternative to protect the rights of [medical malpractice victims] to redress for injuries. . . ." *Kluger,* 281 So.2d at 4. We disagree with the University's contention that the arbitration procedure provided in the statutory scheme constitutes a reasonable alternative remedy or commensurate benefit to claimants and thereby renders *Smith* inapplicable.[17]

In support of its argument, the University cites cases upholding the Workers' Compensation Law,[18] and

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[16] The *Smith* court did not consider whether the statute met the second prong of the *Kluger* test.

[17] At the outset, we reject the University's contention that the contingency factor – permitting defendant unilaterally to cap claimant's damages – distinguishes the absolute cap from the cap at issue. That is a distinction without a difference. Where, as here, defendant decides not to contest liability and determines that claimant's noneconomic damages will surely exceed $250,000, it is virtually certain that defendants will request arbitration. Moreover, we question whether allowing a defendant to cap claimant's noneconomic damages is permissible. *Cf.* Martinello v. B & P USA, Inc., 566 So.2d 761 (Fla. 1990) (defendant not entitled to choose theory under which case is tried).

[18] Sasso v. RAM Property Management, 452 So.2d 932 (Fla. 1984); Mahoney v. Sears, Roebuck & Co., 440 So.2d 1285 (Fla. 1983); Acton v. Fort Lauderdale Hospital, 440 So.2d 1282 (Fla. 1983).

Florida's No-Fault Automobile Insurance Act,[19] against right of access challenges. The Florida Supreme Court held the statutory schemes of those laws constitutional because they employ compulsory insurance coverage no-fault concepts that assure prompt recovery of certain losses. *See Martinez v. Scanlon*, 16 F.L.W. 427 (Fla. June 6, 1991); *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So.2d 204 (Fla. 1989); *Smith; Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974). The no-fault automobile statutes provide a reasonable alternative to tort litigation: vehicle owners are required to purchase insurance to assure injured persons prompt recovery of major economic losses. *Chapman v. Dillon*, 415 So.2d 12 (Fla. 1982); *Lasky; cf. Kluger*, 281 So.2d at 5. Moreover, a claimant may recover some damages despite fault below a certain threshold and enjoys "immunity from being held liable for the pain and suffering of the other parties to the accident. . . . " *Lasky*, 296 So.2d at 14. The failure to maintain insurance negates an owner's tort immunity. *Chapman; Lasky.*

For similar reasons, the supreme court also upheld workers' compensation statutes: those statutes "afford substantial advantages to injured workers, . . . without their having to endure the delay and uncertainty of tort litigation." *Acton v. Fort Lauderdale Hosp.*, 440 So.2d 1282, 1284 (Fla. 1983); *Martinez*, 16 F.L.W. at 428; *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla.), *appeal dismissed*, 469 U.S. 1030, 105 S.Ct. 498, 87 L.Ed.2d 391 (1984); *Mahoney v. Sears, Roebuck & Co.*, 440 So.2d 1285 (Fla.

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[19] Chapman v. Dillon, 415 So.2d 12 (Fla. 1982); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974).

1983). Those advantages include prompt recovery of medical expenses and lost wages without having to prove fault. Furthermore, "[t]he justification for limiting liability or granting immunity is the substitution of something else in its place, a quid pro quo. The duty to provide workers' compensation benefits supplants tort liability to those injured on the job." *Employers Ins. of Wausau v. Abernathy*, 442 So.2d 953, 954 (Fla. 1983).

Those benefits do not obtain under the statutes in issue. Here, a defendant retains causation defenses and the claimant must demonstrate reasonable grounds to initiate medical negligence litigation, § 766.203(2), Fla. Stat. (Supp. 1988), through an extensive presuit investigation procedure.[20] § 766.106, .203-.206, Fla. Stat. (Supp. 1988); *see* Fla. R. Civ. P. 1.650. Thus, although defendant agrees to pay certain damages following presuit screening, the statute does not provide a nofault basis for recovery. Additionally, because insurance coverage is not mandated, defendant's immunity from liability for noneconomic damages in excess of the cap is not dependent on insurance coverage and claimant is not assured recovery of its allowable losses. The statutory scheme does provide certain benefits to claimants. These benefits may include the right to demand arbitration, § 766.207(2), reasonable attorney's fees and costs, § 766.207(7)(b), interest on all accrued damages, § 766.207(7)(e), arbitration costs and fees, § 766.207(7)(g). In addition, defendants are held jointly and severally liable for damages

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[20] Claimant is subject to sanctions upon the court's determination that the claim does not rest on a reasonable basis. § 766.206, Fla. Stat. (Supp. 1988).

awarded to claimant. § 766.207(7)(h). We hold, however, that those benefits are not commensurate with claimant's loss of noneconomic damages in excess of the damage cap.

Furthermore, unlike the workers' compensation statutes and the no-fault automobile insurance statutes, the benefits in the statutes under review are not balanced between claimant and defendant. The true benefit – the damage cap – inures only to the negligent defendant: "a medical patient . . . obtains no compensatory benefit from a cap placed on noneconomic damages because of the unlikeliness of negligence by a patient. . . . " *Smith*, 507 So.2d at 1088 (footnote omitted). *Compare Martinez*, 16 F.L.W. at 428; *De Ayala*, 543 So.2d at 206; *Smith*, 507 So.2d at 1088; *University of Miami v. Matthews*, 97 So.2d 111, 114 (Fla. 1957); *Grice v. Suwanee Lumber Mfg. Co.*, 113 So.2d 742, 745-6 (Fla. 1st DCA 1959).

Finally, the University contends that the statutes provide benefits to all medical malpractice claimants and potential claimants. However, a benefit to society in general does not satisfy *Kluger*. The benefits must inure to the medical malpractice victim. *Smith*. Although the legislature found that the $350,000 cap "represents an appropriate balance between the interests of all patients . . . and the interests of those patients who are injured as a result of medical negligence," § 766.209(4)(a), Fla. Stat. (Supp. 1988), the Florida Supreme Court has held that such an analysis is relevant only if the statute meets the *Kluger* test. *Smith*, 507 So.2d at 1089. Accordingly, a balancing of interests does not support the University's contention that the arbitration procedure is a benefit to claimant. For these reasons, we conclude that the arbitration procedure

does not provide a reasonable alternative remedy or commensurate benefit permitting the legislature to restrict claimant's noneconomic damages.

For the reasons we next discuss, we also hold that the statutory scheme does not meet the second *Kluger* exception – a legislative showing of "an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Kluger*, 281 So.2d at 4.

In *Overland Constr. Co., Inc. v. Sirmons*, 369 So.2d 572, 574 (Fla. 1979), the court stated: "[t]he . . . issue . . . is whether the legislature has shown an overpowering public necessity for *this prohibitory provision*, and an absence of less *onerous* alternatives." (emphasis supplied). The legislative finding that a crisis exists in the medical liability insurance industry is not sufficient to satisfy the requirements of *Kluger* and *Overland*. The findings must demonstrate an overpowering public necessity to cap noneconomic damages of the most seriously injured victims. However, a careful review of the legislative findings does not demonstrate the requisite overpowering public necessity for restricting damages.

In *Carr v. Broward County*, 541 So.2d 92 (Fla. 1989), the supreme court held that a statute of repose in medical malpractice actions does not violate plaintiffs' right of access to the courts. The court held that the legislature demonstrated an overpowering public necessity where the legislature found that absent a statute of repose "doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased costs to the citizens of Florida[.]" *Carr*, 541 So.2d at 94 (quoting preamble

to chapter 75-9, Laws of Florida, Medical Malpractice Reform Act of 1975). *Carr* is distinguishable from the case before us. In *Carr*, the statute merely shortened the time during which claimants could recover the full amount of damages. The Florida Supreme Court has consistently "recognized that statutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests." *Carr*, 541 So.2d at 95; *Blizzard v. W.H. Roof Co., Inc.*, 573 So.2d 334 (Fla. 1991). Here, however, the statute eliminates all recovery in excess of the cap. The supreme court has not recognized the necessity of limiting noneconomic damages absent an alternative remedy or a commensurate benefit.[21] *See generally, Smith; Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783, 789 (Fla. 1985). Moreover, the functional unavailability of insurance for some physicians[22]

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[21] Indeed, "the Task Force recommended 'rejection of a plan that would limit recovery of non-economic damages to $100,000 in all tort cases, including claims for medical negligence.' Two reasons were given for the negative recommendation: first, that 'cost savings from this proposal would be achieved solely by penalizing the most seriously injured victims,' and second, that 'the $100,000 cap is too low . . . and removes recovery for legitimate damages in many cases without providing offsetting benefits for plaintiffs.' " Final Recommendations at 59 (quoting Medical Malpractice Recommendations at 35). However, the Task Force recommended a conditional limitation on noneconomic damages at a higher figure and as part of a plan to provide incentives for arbitration. Medical Malpractice Recommendations at 35.

[22] The Academic Task Force found that "[w]hile representing an expensive, but affordable 'cost of doing business' item for *many* physicians, for *some*, liability coverage *may* be so costly as to be 'functionally unavailable.' (e.g., young practitioners in

does not rise to the level of a danger of inability to obtain medical care. *Carr; Carter v. Sparkman*, 335 So.2d 802, 805 (Fla. 1976) ("At the time of enactment . . . there was an imminent danger that a drastic curtailment in the availability of health care services would occur in this state."), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977), *receded from Aldana v. Holub*, 381 So.2d 231 (Fla. 1980). Finally, it is unclear how effective a damage cap would be in alleviating the cost of loss payments, paid claims, and liability insurance premiums. The legislature found that caps provide an incentive for defendants to admit liability and to arbitrate damages thereby decreasing such costs.[23] Although the Task Force found that the

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high risk specialities serving in less affluent medically underserved regions)." Preliminary Fact-Finding Report on Medical Malpractice, April 14, 1987 at 239-240 (emphasis supplied); Medical Malpractice Recommendations at 10 (same). Thus, "functional unavailability" occurs when insurance premiums are so costly that physicians do not obtain coverage despite its availability. The report states that malpractice insurance is "approaching unaffordability, if it has not already reached it," for some high-risk physicians. *Id.* at 36. However, the Task Force also stated that "medical malpractice insurance has always been available from some source." *Id.* at 37, 40 ("[T]he Task Force has concluded that there is no genuine availability problem. . . . "). *Cf.* De Ayala v. Florida Farm Bureau Cas. Ins., 543 So.2d 204, 206 (Fla. 1989) (workers' compensation program "replace[d] an unwieldy tort system that made it *virtually impossible* for businesses to predict or insure for cost of industrial accidents.") (emphasis supplied). Furthermore, the statute does not remedy the concomitant finding that as a result of the inability to obtain coverage, injured persons will not be able to recover damages; the statute does not mandate insurance coverage.

[23] The legislature also found that a damage cap incentive reduces high litigation costs. That problem, endemic in all

"high-end awards are a substantial cause of the increase in paid losses," Medical Malpractice Recommendations, at 26; *see* § 766.201(1)(b), it failed to differentiate between economic and noneconomic damage awards. Its findings concerning prospective reduction of approximately 2.4% to 11% in loss payments are based on "hypothetical assumptions (rather than empirical data) as to the distribution of economic and non-economic losses in past paid claim data." Final Recommendations at 62. The Task Force warned that the "figures are offered only for what they say about relative magnitude [of savings from a cap on medical claims to savings from a cap on other liability claims]. They should not be misinterpreted as vouching for the amount of savings that might be realized from caps on non-economic damages." Final Recommendations at 63. Such assumptions provide an uncertain predicate for imposing a cap on noneconomic damages. The legislature has not demonstrated the requisite overpowering public necessity for restricting claimant's noneconomic damages.

The legislature must also show that no less onerous alternative method exists for meeting such necessity. *Smith; Overland; Kluger.* The legislature did not expressly find that no alternative method existed; however, the

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litigation, is not sufficiently compelling to warrant a cap on damages. *See* Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979); *but see* American Liberty Ins. Co. v. West & Conyers, Architects & Engineers, 491 So.2d 573 (Fla. 2d DCA 1986). The option to settle meritorious claims, resulting in reduced litigation costs, has always been available.

Task Force considered several alternatives[24] and stated that "[o]f these alternatives, only a cap on non-economic damages would reduce malpractice claims appreciably. . . . " Medical Malpractice Reform Alternatives, October 2, 1987 at 5. That qualified finding does not satisfy the *Kluger* test. *See* Ch. 90-401, preamble, 1990 Laws of Florida ("[T]he legislature finds that the reforms contained in this act are the *only alternative available* that will meet the public necessity of maintaining a workers' compensation system. . . . ") (emphasis supplied); *see also Overland*, 369 So.2d at 573. We decline to infer the requisite showing from the passage of the legislation. Such an inference would render illusory this part of the *Kluger* test. The *Smith* court stated that "if it were permissible to restrict the constitutional right by legislative action, *without* meeting the conditions set forth in *Kluger*, the constitutional right of access to the courts for redress of injuries would be subordinated to, and a creature of, legislative grace or, . . . 'majoritarian whim'. [O]urs is not such a system." *Smith*, 507 So.2d at 1089 (emphasis supplied). Accordingly, we hold that the legislative findings do not satisfy this prong of the *Kluger* test.

In conclusion, we affirm the final summary judgment and hold that sections 766.207 and 766.209 violate article I, section 21, of the Florida Constitution.

Affirmed.

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[24] These alternatives included mandating proof of gross negligence in some situations, providing more specific jury instructions on damages, limiting or abolishing punitive damages, and changing the collateral source offset.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 89-36270 Div (06)

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Plaintiffs,

vs.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,

Defendant.

_____/

SUMMARY FINAL JUDGMENT DECLARING §§ 766.207 AND 766.209, FLA. STAT. (1988 SUPP.), UNCONSTITUTIONAL

This is an action for declaratory judgment in which the plaintiffs seek a judgment declaring (1) that §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.), are unconstitutional; and (2) that the plaintiffs are entitled to a jury trial of their medical malpractice claims against the defendant, at which they may recover the total amount of

their actual damages. The plaintiffs have moved for summary judgment. The facts alleged in the plaintiffs' complaint have been verified by affidavit, and they are not disputed by the defendant. The Court has heard argument of counsel and considered all matters filed of record herein. For the reasons which follow, the Court grants the plaintiffs' motion, and enters a final declaratory judgment granting the relief prayed for in the complaint.

1. Findings of fact.

The plaintiff, Patricia Echarte, is a minor, and is represented here by her parents and natural guardians, Norma Echarte and Pedro Echarte. Mr. and Mrs. Echarte are also plaintiffs, in their individual capacities. On January 10, 1989, Patricia Echarte was admitted to Jackson Memorial Hospital as a patient of agents of the defendant, for surgery unrelated to the incident in suit. The surgery was performed by agents of the defendant on January 11, 1989. As a result of various negligent acts and omissions committed by agents of the defendant during the surgery and the hospitalization which followed, Patricia Echarte's right arm was injured, and it had to be amputated below the elbow on February 8, 1989, to save her life.

On June 22, 1989, the plaintiffs delivered a Notice of Intent to Initiate Litigation letter upon the defendant, as required by § 766.106, Fla. Stat. (1988 Supp.). All other conditions precedent to perfecting the plaintiffs' potential claims for medical malpractice against the defendant were also performed. On July 12, 1989, the defendant responded in writing to the plaintiffs' notice of intent

letter. The response requests that the plaintiffs accept voluntary arbitration of their claims, pursuant to § 766.207, Fla. Stat. (1988 Supp.). The defendant's response amounts to an admission of liability, coupled with a request that the plaintiffs' damages be determined by arbitration rather than jury trial, but subject to the various damage "caps" set forth in § 766.207.

If the plaintiffs accept the defendant's request, liability will be deemed admitted, but the plaintiffs' damages will be limited to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; (3) a percentage of no more than $250,000.00, to be determined by the arbitrators based upon Patricia's percentage loss of the capacity to enjoy life, for the various items of the plaintiffs' non-economic damages otherwise recognized by law; and (4) various costs and limited attorney's fees. If the plaintiffs reject the defendant's request, they will be required to litigate the issue of the defendant's liability, and their damages will be limited by § 766.209, Fla. Stat. (1988 Supp.), to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; and (3) non-economic damages not to exceed $350,000.00. Given her tender age and the nature of her injury, Patricia Echarte's actual damages far exceed those limited amounts. The plaintiffs are legitimately in doubt as to their legal rights.

2. Conclusions of law.

The Court has jurisdiction pursuant to § 86.011, Fla. Stat. (1987).

As applied to the facts in this case, the challenged statutes give the admittedly negligent defendant the unilateral right to "cap" the plaintiffs' damage recovery at an amount which is significantly lower than the actual damages which its negligence caused. The statutes provide no reasonable alternative remedy or commensurate benefit to the plaintiffs. The legislature has also failed to demonstrate that this draconian restriction upon the plaintiffs' constitutional right of access to the courts is required by an overpowering public necessity and that no reasonable alternative exists. The challenged statutes therefore violate Article I, § 21 of the Florida Constitution. *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).

By requiring the plaintiffs to elect between arbitration and their constitutional right to a jury trial, and by arbitrarily "capping" their recovery if they elect the latter, the challenged statutes deprive the plaintiffs of the full benefit of their constitutionally guaranteed right to a jury trial. The challenged statutes therefore violate Article I, § 22 of the Florida Constitution. *Smith v. Department of Insurance, supra.*

The challenged statutes recognize that the plaintiffs have a vested property right in a recovery of their actual damages, because they authorize recovery of the full measure of damages if the defendant had not elected to request arbitration. Yet the statutes delegate to the defendant the unilateral right to deprive the plaintiffs of a portion of that property and retain that portion for its own benefit, without providing any mechanism for compensating the plaintiffs for that "taking". Article X, § 6(a) of the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and

will full compensation therefor paid to each owner . . . ". The challenged statutes clearly violate the plain language of this provision of the Florida Constitution. *See Dade County v. Still*, 377 So.2d 689 (Fla. 1979).

By "capping" the plaintiffs' damage recovery in specific amounts, the challenged statutes create two classifications of medical malpractice victims -- those with insignificant injuries who are compensated in full, and those with serious injuries who are deprived of full compensation. This classification is entirely arbitrary and contrary to the fundamental notion of equal justice under the law. *See Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986). It is also impossible that singling out the most seriously injured medical malpractice victims, rather than imposing the same burden equally upon all such victims, bears any *rational* relationship to the avowed purpose of the statutes. *See Florida Medical Center, Inc. v. Von Stetina*, 436 So.2d 1022 (Fla. 4th DCA 1983), *reversed on other grounds*, 474 So.2d 783 (Fla. 1985). The challenged statutes therefore violate the equal protection guarantees of both the Florida Constitution and the United States Constitution.

To cap a plaintiff's damages at a specified numerically-defined amount without regard to the actual damages caused by a defendant's malpractice is, by definition, to draw an entirely arbitrary line between recovery and non-recovery. *See Smith v. Department of Insurance, supra*. In addition, a statutory scheme which allows insignificantly injured medical malpractice victims to recover the full amount of their damages, but which deprives seriously injured victims of a full recovery (with the extent of that deprivation *increasing* as the extent of injury increases) is both unreasonable and oppressive.

Compare Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974) (no-fault statute which requires tort victims to insure against minor losses but preserves tort remedies for recovery of major losses is reasonable). The challenged statutes therefore violate the procedural and substantive due process guarantees of both the Florida Constitution and the United States Constitution.

The challenged statutes were promulgated as part of Chapter 88-277, Laws of Florida, which contains numerous additional statutes on various disparate subjects not intrinsically related to a unified whole. The challenged statutes were therefore enacted in violation of the "single-subject requirement" of Article III, § 6 of the Florida Constitution.

Finally, the challenged statutes delegate to the defendant the unilateral right to force the plaintiffs to elect between two different procedural courses by which they will enforce their substantive rights, and they grant to the defendant the unilateral right to determine the extent to which those substantive rights can be efficaciously enforced. It is uniquely a judicial function to administer the enforcement of substantive rights, however, and the legislature may not permissibly delegate that function to the only wrongdoer involved in otherwise constitutionally protected litigation. The challenged statutes therefore violate Article II, § 3 of the Florida Constitution.

3. Conclusion.

For all of the foregoing reasons, it is ORDERED AND ADJUDGED as follows:

(1) Sections 766.207 and 766.209, Fla. Stat. (1988 Supp.), violate several provisions of the Florida Constitution and the United States Constitution, and they are hereby declared unconstitutional;

(2) The plaintiffs need not elect between arbitration and jury trial; they are entitled to a jury trial of their medical malpractice claims against the defendant, at which they may recover the total amount of their actual damages.

DONE and ORDERED this 4 day of April, 1990, in Chambers at Dade County, Florida.

AMY STEELE DONNER
CIRCUIT JUDGE
CIRCUIT COURT JUDGE

Copies furnished to:

Counsel of record

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 89-36270

FLA. BAR NO. 203513

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Plaintiffs,

vs.

UNIVERSITY OF MIAMI, d/b/a/ THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,

Defendant.

_____/

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs, Patricia Echarte, a minor, by and through her parents and natural guardians, Norma Echarte and Pedro Echarte, and Norma Echarte and Pedro Echarte, individually, sue the defendant, University of Miami, d/b/a/ The University of Miami School of Medicine, a Florida corporation, and allege:

1. This is an action for declaratory judgment brought pursuant to Chapter 86, Florida Statutes. The Court has jurisdiction pursuant to §86.011, Fla. Stat. (1987).

2. The plaintiff, Patricia Echarte, is a minor, and is represented here by her parents and natural guardians, Norma Echarte and Pedro Echarte. She has a potential medical malpractice action for damages against the defendant.

3. The plaintiffs, Norma Echarte and Pedro Echarte, also have a potential action for damages as a result of the medical malpractice committed against their daughter by the defendant.

4. The defendant, University of Miami, d/b/a/ The University of Miami School of Medicine, is a Florida corporation with its principal place of business in Dade County, Florida.

5. On January 10, 1989, Patricia Echarte was admitted to Jackson Memorial Hospital as a patient of agents of the defendant, for surgical removal of a brain tumor. The surgery was performed by agents of the defendant on January 11, 1989.

6. As a result of various negligent acts and omissions committed by agents of the defendant during the surgery and the hospitalization which followed, Patricia Echarte's right arm was injured, and it had to be amputated below the elbow on February 8, 1989, to save her life.

7. On June 22, 1989, the plaintiffs delivered a Notice of Intent to Initiate Litigation letter upon the defendant,

as required by §766.106, Fla. Stat. (1988 Supp.). All other conditions precedent to perfecting the plaintiffs' claims for medical malpractice against the defendant were also performed.

8. On July 12, 1989, the defendant responded in writing to the plaintiffs' notice of intent letter. A copy of the response is attached hereto. The response, which was received by plaintiffs' counsel on July 14, 1989, requests that the plaintiffs accept voluntary arbitration of their claims, pursuant to §766.207, Fla. Stat. (1988 Supp.). The defendant's response amounts to an admission of liability, coupled with a request that the plaintiffs' damages be determined by arbitration rather than jury trial, but subject to the various damage "caps" set forth in §766.207.

9. If the plaintiffs accept the defendant's request, liability will be deemed admitted, but the plaintiffs' damages will be limited to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; (3) a percentage of no more than $250,000.00, to be determined by the arbitrators based upon Patricia's percentage loss of the capacity to enjoy life, for the various items of the plaintiffs' non-economic damages otherwise recognized by law; and (4) various costs and limited attorney's fees. The plaintiffs' damages far exceed those limited amounts.

10. If the plaintiffs reject the defendant's request, they will be required to litigate the issue of the defendant's liability, and their damages will be limited by §766.209, Fla. Stat. (1988 Supp.), to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's

loss of earning capacity; and (3) non-economic damages not to exceed $350,000.00. The plaintiffs' damages far exceed those limited amounts.

11. The plaintiffs are in doubt as to their legal rights. They believe that the provisions of §§766.207 and 766.209 violate various provisions of the state and federal constitutions – including but not limited to Sections 2, 9, 21, and 22 of Article I of the Florida Constitution, and the access to courts, equal protection and due process provisions of the United States Constitution. As a result, they believe that they are constitutionally entitled to a jury trial of their claims against the defendant for the total amount of their actual damages, and that they cannot constitutionally be compelled to elect between a waiver of their right to trial with limited damages and an exercise of their right to trial with limited damages.

12. In addition, the plaintiffs cannot make an intelligent determination as to whether to accept or reject the defendant's request for arbitration until the constitutionality of §§766.207 and 766.209 is determined. If the statutes are constitutional, for example, the costs and unrecoverable attorney's fees which will be incurred in litigating the various damage issues and the issue of the defendant's liability may exceed the theoretically higher recovery available under §766.209, thereby making it in the plaintiffs' best interests to accept the defendant's request for arbitration under §766.207. On the other hand, if the statutes are unconstitutional, the opportunity for recovery of the total amount of the plaintiffs' actual damages may make it in the plaintiffs' best interests to reject the defendant's request for arbitration and proceed to jury trial of their medical malpractice claims.

13. Because the plaintiffs cannot make an intelligent determination of how to respond to the defendant's request without a prior declaration of the constitutionality of the statutes, this action has been filed within the 30-day period provided by §766.207(3), Fla. Stat. (1988 Supp.), in which to respond to the defendant's request, in order to protect the plaintiffs' rights to accept or reject the defendant's request if the statutes are ultimately declared constitutional.

WHEREFORE, the plaintiffs pray for a judgment declaring §§766.207 and 766.209, Fla. Stat. (1988 Supp.), unconstitutional, and that they are entitled to a jury trial of their claims against the defendant at which they may recover the total amount of their actual damages. Alternatively, if the statutes are declared constitutional, the plaintiffs pray for a declaratory judgment authorizing them to accept or reject the defendant's request for arbitration within 30 days of the date the court's judgment becomes final.

DATED this 11th day of August, 1989.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (TRIAL COURT), PP. 26-27

* * *

E. The Instant Statutes Violate the Plaintiffs' Rights of Due Process Under the Federal (14th Amendment) and Florida (Article X, § 6) Constitutions, Because They Take the Plaintiffs' Property Without Just Compensation.

We have established that the instant plaintiffs, and others like them, have a property interest in the full measure of their damages under Florida law. The statutes in issue themselves recognize this property interest, because they authorize recovery of the full measure of a plaintiff's damages if neither party wants arbitration. Yet they delegate to defendants the unilateral right to deprive such plaintiffs of a portion of that interest, without providing any alternative mechanism for securing the damages lost, or any equivalent benefit. If the defendant exercises that unilateral right, the statutes simply take a portion of the plaintiff's property rights and hand them to the insurance industry (or put them in an uninsured defendant's pocket), with no compensation whatsoever for that "taking."

Article X, §6(a) of the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose ***and*** with full compensation therefor paid to each owner . . . " (our emphasis). The instant statutes clearly transgress that requirement, and that of the federal constitution, by delegating to defendants and their insurers the unilateral right to deprive the plaintiffs of the full measure of their property under Florida law –

property which these very statutes acknowledge – with no compensation whatsoever. Thus, even if these statutes reflected a valid "public purpose," they still would fail to provide "full compensation" for the property deprived. It follows inexorably that the instant statutes authorize an unconstitutional taking of the plaintiffs' property.[31]

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[31] *See State of Louisiana ex rel. Folsom v. Mayor of the City of New Orleans*, 109 U.S. 285, 3 S. Ct. 211, 27 L. Ed. 936 (1883); *Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986); *Dipippa v. United States*, 687 F.2d 14 (3d Cir. 1982); *Morgan Guaranty Trust Co. of New York v. Republic of Palan*, 680 F. Supp. 99 (S.D.N.Y. 1988); *Greyhound Food Management, Inc. v. City of Dayton*, 653 F. Supp. 1207 (S.D. Ohio 1986), *aff'd*, 852 F.2d 866 (6th Cir. 1988); *Morton v. Zuckerman-Vernon Corp.*, 290 So.2d 141 (Fla. 3d DCA), *cert. denied*, 297 So.2d 32 (Fla. 1974); *Confederation Life Association v. Ugalde*, 151 So.2d 315 (Fla. 3d DCA 1963), *aff'd in relevant part*, 161 So.2d 1 (Fla. 1964). And beyond this, as we have noted, the statutes do not reflect a valid "public purpose," in part because they neither require insurance coverage nor regulate rates as a quid pro quo – and for that additional reason, they amount to an unconstitutional "taking" without full compensation.

BRIEF OF APPELLEES, DISTRICT COURT OF APPEAL, P. 33

BRIEF OF APPELLEES, SUPREME COURT, P. 37

* * *

The plaintiffs' property rights are also protected from confiscation without just compensation by the Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment.[19] *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed.2d 358 (1980); *Joint Ventures, Inc. v. Department of Transportation, supra*. The foregoing analysis also applies to this federal constitutional provision – and for the same reasons that the statutes in issue here violate Article X, § 6(a), they vioate the federal constitution as well. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra* (Florida statute which authorizes clerk of court to retain interest on all funds deposited into the registry of the court is an unconstitutional "taking" without just compensation, violative of the Fifth and Fourteenth Amendments).

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[19] This contention was pled and argued below, but the trial court did not expressly rule upon it. It is available to us here under the familiar "right for the wrong reason" rule.

Supreme Court, U.S.
FILED
SEP - 7 1993
OFFICE OF THE CLERK

No. 93-221

In the Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent, University of Miami, submits the following restated questions presented for review in response to petitioners' statement of questions presented for review because petitioners questions, as stated, are argumentative and, therefore, not in conformance with Rule 14.1(a), Rules of the Supreme Court:

1. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fifth Amendment's proscription against the taking of property without just compensation.

2. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fourteenth Amendment's equal protection guarantee.

3. Whether FLA. STAT. §§ 766.207, 766.209 (Supp. 1988) are consistent with the Fourteenth Amendment's guarantee of due process.

RULE 29.1 STATEMENT

Respondent, University of Miami d/b/a The University of Miami School of Medicine, is a Florida Corporation. Pursuant to Rule 29.1, Rules of the Supreme Court, it states that there are no companies that may be considered to be its parent companies or subsidiaries (except wholly owned subsidiaries).

RULE 29.4(c) STATEMENT

As required by Rule 29.4(c), Rules of the Supreme Court, it is noted that the instant petition for certiorari calls into question the constitutionality of two provisions of Florida Statutes, specifically, §§ 766.207, 766.209, and neither the State of Florida nor any agency, officer, or employee thereof is a party to this proceeding. 28 U.S.C. § 2403(b) may be applicable. Respondent has received notice that the petitioners have served the petition for certiorari on the Attorney General of the State of Florida.

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, Patricia Echarte, Norma Echarte, and Pedro Echarte, have sought this Court's certiorari review of the opinion of the Florida Supreme Court upholding the constitutionality of Florida Statutes §§ 766.207, 766.209 (Supp. 1988), which provide incentives for prompt resolution of medical malpractice claims through voluntary binding arbitration and which provide a contingent monetary cap on non-economic damages in medical malpractice claims when a claimant refuses a defendant's offer to admit liability and arbitrate damages. Petitioners contend that application of the subject

statutes results in an improper taking of property without just compensation in violation of the Fifth and Fourteenth Amendments, violates petitioners' Fourteenth Amendment right to due process, and violates petitioners' Fourteenth Amendment right to equal protection. In its opinion, the Florida Supreme Court definitively established the constitutionality of the statutes under the Florida Constitution's access to courts provisions and discussed that independent state constitutional challenge in detail. It also confirmed the constitutionality of the statute on all other grounds raised, including federal constitutional issues. Although the court did not discuss those findings in detail, the court's specific resolution of the stringent state constitutional access to courts challenge determines — by necessity — the less inclusive challenges raised herein. Petitioners have failed to raise a substantial federal question. In addition, petitioners have failed to establish, as required by Rule 10 of this Court, the existence of conflict between the opinion of the Florida Supreme Court and this Court or other state courts of last resort. Thus, respondent, University of Miami, submits this brief in opposition to the petition for writ of certiorari filed herein and suggests that this case does not warrant certiorari review by this Court.

STATEMENT OF THE CASE

Petitioners' unsubstantiated history regarding an absolute, across-the-board damage cap for all tort actions is nothing more than argument and is wholly irrelevant to the issue before this Court — the appropriateness of this Court accepting certiorari jurisdiction over a decision of the Florida Supreme Court upholding later statutes limited to medical malpractice actions. Their reference to a change in the composition of the Florida Supreme Court and suggestion that it was this change that resulted in a different decision completely ignores the nature of the inquiry and suggests an identity between the absolute across-the-board cap on non-economic damages in all tort actions and the contingent cap in the instant action, which

simply does not exist. If anything, the passage of the 1986 Tort Reform Legislation, which followed earlier tort and malpractice reform legislation in 1975, 1976, and 1985, suggests the Florida Legislature's continuing efforts to deal with an unresolved crisis in the insurance and tort arenas with particular emphasis on medical malpractice. The only relevance of the 1986 Legislation was that it established an Academic Task Force to study the tort and malpractice crisis and prepare reports and recommendations. The Florida Legislature relied upon these reports and recommendations when it enacted the statutes in issue, and the majority of the Florida Supreme Court ultimately considered these reports and recommendations in making its determination on the constitutionality of those statutes.

The Florida Legislature recognized that the state was undergoing a health care crisis. Medical malpractice verdicts were skyrocketing, causing insurance premiums to expand dramatically to the point of becoming functionally unavailable. As a result, physicians in high-risk specialties were limiting their practices; and, the citizens of Florida presently could not afford or even obtain necessary care at any price. Similar issues were prevalent in the general tort insurance industry as well. Thus, in 1986 the Florida Legislature enacted the Tort Reform Act of 1986, which included a number of modifications to existing tort law, including an across-the-board cap on noneconomic damages in all negligence cases. Although that cap was stuck down on Florida constitutional access to courts and right to jury trial grounds, an additional provision relating to abrogation of joint and several liability was upheld in response to challenges based on access to courts and equal protection grounds; and, other provisions relating to punitive damages, remittitur and additur settlement conferences, itemized verdicts and alternative methods for payment of damage awards were upheld against constitutional challenges on other grounds. *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987). As part of the 1986 comprehensive tort reform legislative package, the legislature established an "Academic Task

Force For Review of The Insurance and Tort Systems" to analyze the medical malpractice crisis and recommend solutions.[1] The Task Force originally was directed to report on its findings and recommendations by March 1, 1988. However, because then-Governor Martinez and legislative leaders recognized the urgency of the medical malpractice and malpractice insurance crisis and the need for an immediate response, they requested an expedited report on the subject of medical malpractice. Accordingly, on August 14, 1987, the Task Force released a "Preliminary Fact-Finding Report on Medical Malpractice." Other Task Force reports, upon which the Florida Supreme Court reviewed and relied, included the Medical Malpractice Reform Alternatives, dated October 2, 1987, Medical Malpractice Recommendations, dated November 6, 1987, and Final Recommendations, dated March 1, 1988.[2]

The Task Force had conducted an extensive study of the malpractice crisis. Contrary to petitioner's assertions, this study was not the result of special interest lobbying, but rather the result of a comprehensive literature research and review, seven public meetings, eight separate research projects, surveys of 1500 randomly selected physicians and 1500 attorneys who regularly handle tort cases, computer analysis of the financial situation of liability insurance carriers, an analysis of Florida civil litigation rates, and a final six hour hearing to preview the preliminary findings from the eight research projects. In the Medical Malpractice Preliminary Fact Finding Report, the Task Force identified the dollar amount of paid

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[1] 1986 LAWS OF FLORIDA, ch. 86-160. The Task Force consisted of three university presidents and two businessmen with distinguished public service records. Additionally, the task force hired a professional staff with expertise in insurance and finance, actuarial science law, economics, and medicine. The Task Force did not include members of special interest groups. Thus, for petitioners to suggest that the legislation in issue was established at the behest of the "powerful medical and insurance industry lobbies" is disingenuous.

[2] *University of Miami v. Echarte*, 618 So. 2d 189, 191 n.11 (Fla. 1993).

claims and the delays, costs, and uncertainty inherent in the tort system as major concerns.[3] As a result of that study, the Task Force recommended a comprehensive program to address the problems underlying the medical malpractice crisis.

In February 1988, the Governor called the Florida Legislature into a special session to address the medical malpractice crisis in Florida. The legislature relied on the Task Force's extensive study, considered the Task Force's recommendations, weighed the various alternatives, balanced the policy reasons supporting each alternative, and promulgated legislation to meet this public need.[4]

The Legislature specifically found that a number of problems contributed directly to the malpractice crisis in the State of Florida, which adversely affects the availability and affordability of health care in Florida. The legislature considered numerous alternative methods to address the many problems. However, after considering every option, the legislature determined that the only way to address the entire crisis was to implement a comprehensive solution, including a contingent cap on non-economic damages and a voluntary arbitration procedure. The contingent cap on non-economic damages was an integral part of this comprehensive legislative response.

Although petitioners refer correctly to the ultimate decision of the majority of the Florida Supreme Court and discuss the dissent, in detail, they fail to discuss the findings of the majority, and they refuse to recognize the basis for those findings.

Even a cursory review of the majority's decision reveals a well-reasoned and in-depth analysis of the constitutional is-

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[3] *Echarte*, 618 So. 2d at 196 n.17.

[4] The preamble to this legislation and the specific legislative findings in support of the legislation are quoted in the Florida Supreme Court's decision in *Echarte*, 618 So. 2d at 191 n.12, 192 n.13, which is reproduced in its entirety in petitioners' appendix.

sues, specifically with respect to the right of access to courts under Florida law, but implicitly applicable to all the issues that are now raised before this Court. The Florida Supreme Court reviewed in detail the Academic Task Force reports upon which the Florida Legislature relied when it enacted the statutes, reviewed the specific legislative preamble to the statutes, and reviewed the Legislative Findings. The court ultimately found that the Florida Legislature had determined both the existence of an overpowering public necessity and the lack of an alternative method of meeting that public necessity other than through enacting the legislation. It also found that the legislature had provided commensurate benefits to claimants whose purported right to recover non-economic damages in excess of $350,000 would be limited by their refusal to accept a defendant's offer to admit liability and arbitrate damages as part of the prompt resolution plan. All necessary conclusions derived from that analysis that support the court's decision become apparent upon reading the majority's decision and reveal the court's proper balance between its power and duty to invalidate legislative enactments that violate the Constitution and the power and duty of the legislature to enact legislation in furtherance of the public welfare. The simple truth of petitioners' assertion of facts and indeed their entire argument is that they would align themselves with the minority justices in the Florida Supreme Court. Their statement of the facts reflects that alignment. Thus, respondent respectfully suggests that this Court review carefully the majority decision, which is the only relevant source from which this Court may determine whether a question meriting this Court's federal constitutional review exists.

REASONS FOR DENYING THE PETITION

1. This petition raises no important question of federal law that has not been, but should be, settled by this Court, nor does it establish that the Florida Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court or of another state court of last resort.

This petition should be denied because it lacks any "special and important reasons" for granting it, as required by Rule 10.1 of this Court. There is no conflict between the judgment of the Florida Supreme Court and decision of any other state court of last resort. Likewise, there is no conflict between the judgment of the Florida Supreme Court and this Court. None of the cases petitioners cite in support of conflict deal with the precise issues in this case; they are distinguishable and can be harmonized upon a careful review of the facts and issues raised.

Additionally, the petition raises no question that has not been, but should be, settled by this Court. This Court has denied certiorari review of state supreme court decisions upholding the constitutionality of medical malpractice reform legislation. In those cases, the statutes were considerably more restrictive in their scope; *i.e.*, they contained across-the-board caps on recovery with considerably less "quid pro quo" inuring to the plaintiffs. Those cases raised the issues that are being raised before this Court — equal protection and due process — with the exception of the Takings Clause issue. Inasmuch as the Takings Clause issue, as discussed *infra*, does not raise a substantial federal question in this particular case, and as this Court previously has denied review of similar legislation, there is no reason for this Court to consider the issues again.

2. Petitioners have failed to establish that the Florida Supreme Court's finding that the statutes did not constitute an unconstitutional taking of property without just compensation raises an important federal question that has not been, but should be, decided by this Court.

Petitioners rightly suggest that their first contention is unconventional; however, the contention is not supported by applicable case law. First, petitioners misconstrue this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), as holding that petitioners' unliquidated, contingent action for damages in tort is a vested property right entitled to compensation if taken by state action. Although this Court has suggested that a cause of action is a "species" of property, *id.* at 428, one's property right in any cause of action does not vest until that party obtains a final unreviewable judgment. *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989) (citing *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 988 (9th Cir. 1987), *cert. denied sub nom., Konizeski v. Livermore Labs*, 485 U.S. 905 (1988)), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 1260 (1991); *Hammond v. United States*, 786 F.2d 8, 12, 14 (1st. Cir. 1986)); *see also Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("a legal claim affords no definite or enforceable property right until reduced to final judgment"). Accordingly, where, as here, a statute limits recovery to a party who has not yet obtained a final, unreviewable judgment, there can be no "taking" violation of the Fifth Amendment. *See Arrieta-Gimenez v. Arrieta-Negron*, 859 F.2d 1033, 1038 n.2 (11th Cir. 1988); *Hammond*, 786 F.2d at 14 ("We have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a 'taking' here.") Thus, petitioners' argument regarding the Fifth Amendment fails on this threshold issue.

Nevertheless, even if this Court were to determine that petitioners' cause of action were to constitute property, petitioners have failed to establish that the statutes in issue

constitute a "taking." This Court has held that there is no set formula for determining whether compensation is constitutionally due for a government restriction of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The Court must engage in an essentially ad hoc factual inquiry. *Id.* (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). This inquiry is based on the following standards:

> The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.* (citation omitted).

Id. (quoting *Penn Central*, 438 U.S. at 124). In this case, petitioners have failed to show that the statutes in issue affect in any way investment-backed decisions. More importantly, these statutes can be characterized best as merely a public program adjusting the benefits and burdens of economic life to promote the common good, rather than a physical invasion by government onto the petitioners' alleged intangible property interest.

The statutes promote the availability and affordability of health care to all Floridians. In addition, the statutes provide malpractice plaintiffs the possibility of recovering *all* their actual medical costs within a very short time, plus recovering attorney's fees *in addition to* their recovery for actual damages, lost earnings, and pain and suffering damages, rather than having to pay them out of the total recovery. Certainly this can be described best as an adjustment of benefits and burdens of economic life, rather than a physical intrusion. Accordingly, petitioners have failed to establish a valid basis under the Takings Clause to merit this Court's discretionary review.

3. Petitioners' equal protection claims fail to present a substantial federal question and fail to establish conflict with this Court or other courts.

Petitioners have failed to raise a substantial federal question regarding their equal protection claim. This Court established in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), that a statutory limitation on liability for a common law cause of action does not violate equal protection so long as the statute's liability limitations are rationally related to any disparate treatment between plaintiffs affected by the act and plaintiffs otherwise similarly situated. *See id.* at 93-94 ("The general rationality of the Price-Anderson Act liability limitations — particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy — is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes."). The Florida Supreme Court considered the equal protection issue in reaching its decision. Though it did not discuss the issue at length, in determining that the statutes in issue did not violate the Florida Constitution's right of access to courts the court necessarily determined that the statutes did not violate petitioners' equal protection rights. *University of Miami v. Echarte*, 618 So. 2d 189, 191 (Fla. 1993). The court determined that the legislation limiting recovery of what are basically arbitrary damages — non-economic "pain and suffering" damages — was rationally related to the strong state interest in providing access to affordable health care for all of Florida's citizens, ensuring that physicians maintain medical malpractice insurance to compensate injured patients for their actual damages, and ensuring that the parties affected by the legislation receive a commensurate quid pro quo — immediate payment of damages, entitlement to attorney's fees — in return for the limitation on those non-economic damages. This Court reached a similar conclusion in *Duke Power*. 438 U.S. at 93 (after determining that a sufficient quid pro quo existed to defeat a due process

challenge, this Court concluded that no equal protection violation existed — "the equal protection arguments largely track those made in support of the due process claim"). Accordingly, because the Florida Supreme Court's decision is firmly supported by this Court's previous rulings, petitioners have failed to raise a substantial federal question.

In addition, this Court consistently has refused to review decisions upholding the constitutionality of malpractice damage limitations in the face of equal protection challenges.[5] This Court should do the same here, for petitioners offer neither authority nor reason for examining whether the statutes here satisfy federal equal protection guarantees. This case simply does not raise a substantial federal question.

Petitioners similarly have failed to establish that the Florida Supreme Court's decision conflicts with decisions of other state supreme courts or this Court. Many states, in addition to Florida, have enacted tort reform legislation affecting medical malpractice claims that incorporate a limitation on recovery in such legislation. These states have determined that recovery limitations, especially limitations on non-economic damages, are a reasonable and proper means of ensuring the availability and affordability of health care for their citizens.[6] However, the

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[5] *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 S.W.2d 517, (La. 1992), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 2338(1993); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1991), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 511 (1992); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (dismissed by this Court as not raising a substantial federal question); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

[6] *See, e.g.*, ALA. CODE §§ 6-5-544, 6-5-547 (Supp. 1991) ($400,000 limitation on noneconomic damages); ALASKA STAT. § 09.17.010 (Supp. 1991) ($500,000 limitation on noneconomic damages); CAL. CIV. CODE § 333.2 (West Supp. 1992) ($250,000 limitation on noneconomic damages); COLO. REV. STAT. § 13-21-102.5, § 13-64-302 (Supp. 1991) ($1 million limitation on all damages, $250,000 limitation on noneconomic damages); HAW. REV. STAT. § 663-8.7 (1988 & Supp. 1991) ($375,000 limitation on damages for pain and suffering); IDAHO CODE § 60-1603 (1990) ($400,000 limitation on

damage "caps" have received mixed reviews in state courts. In many cases, both state and federal courts have sustained such statutes against a wide variety of constitutional challenges.[7] In

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noneconomic damages, annually adjusted); ILL. ANN. STAT. ch. 70 ¶101 (Smith-Hurd Supp. 1978) ($500,000 limitation on all damages); IND. CODE ANN. § 16-9.5-2-2 (Burns 1975) ($500,000 limitation on all damages); KAN. STAT. ANN. § 60-3407 (Supp. 1991) ($1 million limitation on all damages); KAN. STAT. ANN. § 60-10a02 (Supp. 1991) ($250,000 limitation on noneconomic damages); LA. REV. STAT. ANN. §§ 40:1299.41-48 (West 1991 & Supp. 1993) (limiting recovery of damages in any case to $100,000 from a qualified health care provider and an additional $400,000 from patient's compensation fund); MD. CTS. & JUD. PRO. CODE ANN. § 11-108 (1989) ($350,000 limitation on noneconomic damages); MASS. GEN. L. ch. 231, § 60H (Supp. 1992) ($500,000 limitation on noneconomic damages); MICH. STAT. ANN. § 24A.1483 (Callaghan Supp. 1991) ($225,000 limitation on noneconomic damages, subject to exceptions and adjustments); MINN. STAT. ANN. § 549.23 (West 1988) ($250,000 limitation on intangible losses); MO. REV. STAT. § 538.210 (1988) ($350,000 limitation on noneconomic damages, annually adjusted for inflation); NEB. REV. STAT. § 44-2825 (1988) ($1 million limitation on all damages); N.H. REV. STAT. § 5084-D (Supp. 1991) ($875,000 limitation on noneconomic damages); N.M. STAT. ANN. § 41-5-6 (1989 & Supp. 1991) ($500,000 limitation on all damages, excepting medical care expenses); N.D. CENT. CODE § 26-40.1-11 (1978) ($300,000 limitation on all damages); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991) ($200,000 limitation on all damages); OKLA. STAT. ANN. tit. 76, § 18 (West 1987) (limits recovery to actual medical expenses incurred, in action brought more than three years from incident); ORE. REV. STAT. § 18.560 (1989) ($500,000 limitation on noneconomic damages); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987) ($1 million limitation on all damages); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.02 (Vernon Supp. 1992) ($250,000 limitation on all damages, exclusive of medical expenses); UTAH CODE ANN. § 78-14-7.1 (1987) ($250,000 limitation on noneconomic damages); V.I. CODE ANN. tit. 27, § 166 B (Supp. 1991) ($250,00 limitation on noneconomic damages); VA. CODE ANN. § 8.01-581.15 (1984) ($1 million limitation on all damages); WASH. REV. CODE ANN. § 4.56.250 (1988) (formula limitation on noneconomic damages based on life expectancy and average annual wages); W. VA. CODE § 55-7B-8 (Supp. 1991) ($1 million limitation on noneconomic damages); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1991) ($1 million limitation on noneconomic damages, annually adjusted).

[7] *See, e.g., Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 S.W.2d 517 (La. 1992), *cert. denied*, ___ U.S. ___ , 113 S. Ct. 2338 (1993) (upholding statute on state and federal constitutional grounds, certiorari denied on

other cases, certain limitations provisions have been stricken as unconstitutional.[8] State court cases holding damage caps unconstitutional, however, have done so almost exclusively on grounds of perceived inconsistencies with state constitutional provisions. No decision has held squarely a statutory limitation on recovery in tort to be proscribed by federal equal protection guarantees in the absence of independent state constitutional

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petition alleging violation of equal protection); *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992) (jury trial, due process, equal protection); *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898 (Mo. 1991), *cert. denied*, — U.S. — , 113 S. Ct. 511 (1992) (state and federal equal protection, state open courts provision, trial by jury, due process); *Robinson v. Charleston Area Medical Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (equal protection, due process); *Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 376 S.E.2d 525 (1989) (equal protection, jury trial, due process, special legislation); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (jury trial, access to courts); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989) (equal protection, jury trial, due process); *Rose v. Doctor's Hosp. Facilities*, 735 S.W.2d 244 (Tex. App. — Dallas, 1987), *aff'd*, 801 S.W.2d 841 (1990) (due process, open courts, equal protection); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985) (state and federal equal protection, due process); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (federal equal protection); *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374,404 N.E.2d 585 (1980) (due process, equal protection, special legislation, right to jury trial); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977) (special legislation, equal protection); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (state access to courts, due process, special legislation).

[8] *See, e.g., Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) (state right to trial by jury; state equal protection); *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991) (substantive due process); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989) (jury trial, substantive due process); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (jury trial, due process); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (open courts); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (special legislation); *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (access to courts provision; upheld on other grounds); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (state equal protection); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (state equal protection); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (equal protection).

bases for the decision. Instead, this Court consistently has denied certiorari review of decisions wherein federal equal protection has been raised.

No conflict exists among state courts or between state and federal courts on the constitutionality of limitations on recovery in malpractice actions as a matter of federal equal protection, especially where, as here, the Florida Supreme Court determined that the legislation was reasonably related to a legitimate state interest, and where the statute provides a sufficient quid pro quo to the parties allegedly adversely affected by the legislation. Accordingly, this Court should decline to review this case.

4. Petitioners' due process claims fail to present a substantial federal question and fail to establish conflict with this Court or other courts.

For the reasons set out in *Duke Power*, 438 U.S. 59, and in the Florida Supreme Court's opinion in this case, 618 So. 2d 189, petitioners have failed to present a substantial federal question regarding their due process claims. *Duke Power* held that legislation such as the legislation in this case must be rationally related to a legitimate state interest to satisfy due process. *See Duke Power*, 438 U.S. at 83 ("the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way"). This Court discussed the issue of whether a legislative limitation on damages requires providing the claimant a commensurate benefit in return to satisfy due process:

> [I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since [the act] does, in our view, provide a reasonably just substitute [satisfactory quid pro quo] for the common-law or state tort law remedies it replaces.

Id. at 88 (footnote and citations omitted). Thus, if a statute provides a satisfactory quid pro quo, the federal due process test necessarily is met. The Florida Supreme Court considered an even stricter standard in determining that the subject legislation did not violate Florida's access to courts provision of the state constitution. Under *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a two-part test to determine whether a statute satisfied the access to courts provision of the constitution:

> [w]here a right of access to courts . . . where such right has become a part of the common law of the State . . . , the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So. 2d at 4. The Florida Supreme Court determined that the subject legislation met both prongs of the test; *i.e.*, not only did the court determine that the Legislature showed an overpowering public necessity for the limitation on recovery for which no alternative method of meeting the public necessity (availability and affordability of health care) could be shown, but also that the subject legislation provided claimants a "commensurate benefit" in exchange for the right to full recovery of non-economic damages. *Echarte,* 618 So. 2d at 194. Thus, applying the Florida Supreme Court's reasoning to *Duke Power,* the court clearly determined that the statute satisfied federal due process requirements. Accordingly, because the decision comports with the requirements of *Duke Power*, petitioners have failed to raise a substantial federal question on due process.

Petitioners equally have failed to establish that a conflict exists among state courts of last resort or between state courts and federal courts regarding due process. For the reasons stated in the equal protection section, no conflict exists among

courts on whether legislation limiting recovery to medical malpractice tort claimants satisfies due process where, as here, the subject legislation provides claimants a commensurate benefit in return for a limitation on damages. Instead, this Court consistently has refused to review state court decisions affirming the constitutionality of such provisions. Accordingly, there remains no basis or reason for this Court to review this case. It should, therefore, decline to do so.

CONCLUSION

For the foregoing reasons, Respondent, University of Miami, d/b/a The University of Miami School of Medicine, respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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